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REPORTS OF CASES
ADJUDGED IN THE
HIGH COURT OF CHANCERY,

BY
THE VICE-CHANCELLOR SIR JOHN STUART.

BY
J. W. DE LONGUEVILLE GIFFARD,
(OF THE INNER TEMPLE,)
ESQUIRE, BARRISTER-AT-LAW.

VOL. I.

1858-9.

A few Cases of an Earlier Date have been added, to complete the Series.

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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

High Court of Chancery,

COMMENCING IN

EASTER TERM, 22 VIC. 1859.

PERRY *v.* SHIPWAY.

1859.

April 19, 20, 21.

THIS was a motion for a decree, on behalf of nine out of twelve of the trustees of the Baptist Chapel at Sible Hedingham, in Essex. First, that the trusts of the indentures of the 21st of September, 1808, and the 13th of December, 1814, might be administered under the direction of the Court. Secondly, that the defendant Charles Shipway, might be restrained by injunction, from disturbing, hindering, or molesting, the pastor, deacons, and members of the congregation of Calvinistic Baptists in the performance of Divine worship, or from otherwise disturbing any of the members in the enjoyment of the use of the said chapel. Thirdly, that the defendant Shipway might be restrained from officiating as pastor of the said congregation, and

The minister of a dissenting chapel, although duly elected, is at law only tenant at will of the trustees, in whom the legal estate is vested, and the majority of trustees in a trust constituted for such a purpose can bind the minority. Therefore, where a dissenting minister, invited to preach for a year on proba-

tion, was, after preaching for some months, excluded from the chapel by the majority of trustees, on account of dissatisfaction as to his conduct, and afterwards, with the assistance of the minority of the trustees, got possession of the chapel and put on new locks, so as to exclude the majority of the trustees—The Court granted an injunction to restrain the minister and minority of the trustees from disturbing the legal right of the majority of the trustees to the possession and management of the chapel.

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from preaching, or intermeddling with the service to be performed in the same chapel. Fourthly, that the defendants, Ruggles, Barrell and Finch, might be restrained from sanctioning or permitting Shipway to preach or officiate in the said chapel.

By an indenture bearing date the 21st of September, 1808, between Thomas Halls, of the first part, and William Scandrett, of the second part, and the other parties therein named, reciting that by money subscribed by a society of Protestant Dissenters called Particular or Calvinistic Baptists, land had been purchased, and a meeting-house erected at Sible Hedingham; and reciting that for better securing the said chapel for the use of the said society, the said Thomas Halls was requested to release the said message to the said William Scandrett, and the other parties of the second part. It was thereby witnessed that the said Thomas Halls did bargain, release, &c., the said message unto the said William Scandrett, and the other parties of the second part, “upon trust for the use and benefit of the society or congregation of Protestant Dissenters called Particular or Calvinistic Baptists, now assembling at the said meeting-house under the pastoral care of the said William Scandrett, maintaining the doctrines of the One living and true God, Three equal persons in the Godhead, eternal and personal election, original sin, particular redemption, free justification by the imputed righteousness of Christ, regeneration, conversion, and sanctification by the Spirit and grace of God, the final perseverance of the saints, the resurrection of the body to eternal life, the future judgment, the eternal happiness of the righteous, and everlasting misery of such as die impenitent; and practising baptism by immersion to such as are of years of understanding, upon their own personal confession of repentance towards God and faith towards our Lord Jesus Christ, for the exercise of Divine Worship by them at the meeting-house aforesaid. And upon further trust, to con-

vey the said messuage, tenement, or meeting-house and premises, with the appurtenances, from time to time, to such persons for the purposes aforesaid, as the men members, communicants of the said society or congregation of Particular or Calvinistic Baptists, holding the doctrines aforesaid, for the time being in their church meeting duly assembled, or the major part in number of them so assembled, shall by any deed or instrument, in writing, from time to time direct or appoint, so that the same may be made use of only as far as it lawfully can or may, as a place of worship for Particular or Calvinistic Baptists holding the doctrines before mentioned. But in case the society or congregation of Particular or Calvinistic Baptists shall be totally dissolved or dispersed, and the public worship at the said meeting-house discontinued by them for the space of twelve calendar months together, then upon further trust to convey the said messuage, tenement, or meeting-house, hereditaments, and premises, with the appurtenances, unto such person or persons in such manner and for such purposes, either religious or civil, as the men members, communicants of the said congregation or society at the time of such dissolution or dispersion shall have been members, communicants, and subscribers to the support of public worship for the space of twelve calendar months then next preceding, and contributing thereto, or the major part in number of such men members, communicants, shall by any deed or deeds, writing or writings, direct or appoint." It was also further witnessed that the parties of the second part covenanted to hold the said premises upon those and no other trusts than those expressed in the same indenture, and undertook whenever they should be requested by the men members of the said congregation, or the major part of them assembled at any church meeting, to be called for that purpose, to convey the said piece of land, the said messuage or meeting-house, with the appurtenances, unto such other persons

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as the men members of the said congregation or society in their church meeting duly assembled shall elect, choose, and appoint for that purpose, their heirs and assigns upon the trusts before mentioned. By a deed dated the 13th of December, 1814, a further piece of ground was purchased by the society from a Mr. Flack, for the purpose of enlarging the burial ground, and was conveyed to the then trustees upon the same trusts. By a deed dated the 22d of April, 1845, new trustees were appointed to replace those who had died.

It was averred in the affidavit of Mr. Thomas Letch, one of the plaintiffs, that a Baptist society consists of three classes, the pastor, the deacons, and the other communicants who are called "the members." That the society is governed by general ordinances, which are settled by the general body of Calvinistic Baptists. That every person seeking to become a member of a church of Calvinistic Baptists, is admitted a member of such church at a meeting called for that purpose, and his admission is duly enrolled in the book of such church. If charged with an offence against the said rules and ordinances, he is liable to be temporarily separated from his church by the resolution of a majority of the members and communicants of such church called to investigate the charge, and if deemed incorrigible, to be finally separated. An entry of the said resolution is made in the church book, and the said temporary or final separation is thereupon endorsed. The pastor of such congregation is first invited to officiate for a given time by way of probation, and if approved, is then elected as pastor by a majority of the church present at a meeting called for that purpose. He is also liable to temporary or final separation for the same causes as the other members.

On the 29th of November, 1857, at a church meeting duly held, the defendant Shipway was invited by the congregation to preach, on probation, in the chapel, for twelve months, from Christmas, 1857, which invitation he ac-

cepted, and officiated as pastor until April, 1858. In April, 1858, the then deacons and trustees were informed that the defendant Shipway had attempted to seduce the wife of one of his congregation. The deacons and trustees (except the trustee James Goss, who took no part in the dispute), at about eight o'clock on the evening of Saturday, the 10th of April, sent one Wiseman requesting Shipway's immediate attendance at Mr. Letch's house (who had previously called several times, but without stating his object), and between whom and Shipway some angry words had passed. The defendant Shipway returned for answer that he was too unwell to go out. About half-past ten Wiseman returned, and handed Shipway the following notice:—

“According to several notices given you, a meeting of trustees and deacons has been held at Walter Letch's requesting your attendance; but not making your appearance, we proceeded in your absence, when certain criminal charges were brought in and proved against you by Mrs. Kitty Letch, on which account the deacons and trustees have agreed that the chapel shall be closed against you, and that you occupy the pulpit no more.

“By order of the trustees, as ordered on this paper.

“JOHN RUGGLES.
 THOMAS SMITH.
 WILLIAM ABRAHAMS.
 THOMAS HUTTON.
 THOMAS ROOT.
 THOMAS MARTIN, his mark.
 WILLIAM BARRELL.
 CHARLES FINCH.
 THOMAS PERRY.
 THOMAS LETCH.
 JOHN PETTIT.
 SAMUEL NOTT, senior.

“April 10, 1858.”

It appeared from the evidence that Messrs. Ruggles and Barrell, two of the trustees and deacons, and Finch, a deacon, had retired before the resolution was drawn up, having

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to return home four miles, but they had authorised the affixing their names to the resolution, though they had afterwards espoused the other side. On the following day the chapel doors were closed, and a constable stationed at the door. On the 27th of April, the defendant was convicted before the magistrates at Sible Hedingham of a common assault on Mrs. Kitty Letch, and fined 1*l*. The defendant Shipway, on the 18th of April, preached to a congregation in his own garden; and, subsequently, at Crouch Green, on the 16th of May. A minute of a resolution passed by the church was entered as follows: "1858, at a church meeting held at noon, the 16th of May, being Lord's day, the church then expressed their satisfaction at what had been done in keeping Mr. Shipway out of the pulpit, and passed a resolution never to allow him to occupy the pulpit again." After the 16th of May, the trustees (the chapel having been closed for about three Sabbaths) got several ministers to officiate. On the 30th of May, a church meeting was held (it being usual to hold such meetings on the last Sabbath in each month) when from thirty to forty members, male and female, were present. The special object of the meeting was that the church might give its opinion with reference to those members who adhered to Mr. Shipway. "It was then considered that these persons are disorderly in trying to uphold such a character, it is therefore resolved not to acknowledge them as members so long as they follow him."

On the 4th of July, 1858, a Mr. Murrell Plaice, by direction of three of the trustees and deacons who were opposed to Mr. Shipway, officiated in the morning and afternoon. At the conclusion of the afternoon service, but before the congregation had left, Mr. Shipway entered, accompanied by a large number of his adherents, and took possession of the chapel. They held, or professed to hold a church meeting, at which the following resolutions were passed:

First, That Charles Shipway be elected a member of the church.

Secondly, That he become the pastor.

Thirdly, That new locks be placed on the chapel doors.

Watchers remained all night in the chapel, who were supplied with refreshments, for which Mr. Shipway paid. The next day new locks were placed on the doors of the chapel, which had remained ever since in Mr. Shipway's possession.

The plaintiffs claimed to be entitled to remove the pastor for misconduct. The following is an extract from the affidavit of Mr. John Abrahams, aged 79.

I have been a member of the Baptist Chapel since its formation in 1802, and am still a member.

That it has always been the practice before admitting any one as a member, to read over to them the articles of faith and rules of practice contained in the church books, which they are obliged to consent to before such admission takes place.

That during the whole of the time that I have been connected with the said church as a member thereof, the church has exercised a watchful care over the members thereof with regard to their walk and conversation in the world, in order that they may bring nothing ill upon it; and where their behaviour has not been such as became Christians, they have been separated from the said church, and, if afterwards not found repentant, and leading a better life, they have been excluded from their membership.

That the church books abound with instances where members have been so dealt with, and also in one instance where a member "named Scandrett was treated in like manner."

It appeared that Mr. Scandrett was removed by a small majority.

The defendant Shipway deposed that no notice of the church meeting of the 16th May had been given, and that it was attended only by a few of the plaintiff's friends, but it

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was alleged by the plaintiffs that notice had been given during the service, and that more than 30 attended.

There was also evidence that Mr. Shipway was addicted to drunkenness, but there was considerable conflict in the evidence on this head, and this part of the case was not relied on by the plaintiffs.

The defendants adduced evidence to show that the meetings at which the resolutions relied on by the plaintiffs had been passed were informal, as the meetings had not been convened on notice. The charges of immorality and intoxication were positively denied, and it appeared that a memorial, expressing disbelief in the charges against Mr. Shipway, and confidence in him as a minister, had been signed by 158 of his congregation, including Messrs. Ruggles, Barrell, and Finch, two of them being trustees, and all three deacons.

Argument.

Mr. *Malins*, with Mr. *F. J. Turner*, contended that the trustees had not exceeded their duty when they closed the chapel against the defendant Shipway, on what they believed to be sufficient grounds. It was not material to show that the charge against him was proved, though he had been legally convicted, but it was enough for the trustees to show that they had acted in the honest exercise of their discretion, to entitle them to be protected against the irregular acts of the defendants.

Mr. *Bacon*, Mr. *Craig*, and Mr. *Graham Hastings*, for the defendants, contended that the right of appointing the minister was given by the deed creating the trust, not to the trustees, but to the majority of the men members. The trustees had merely a dry trust; but at a church meeting held on the 4th of July, Mr. Shipway was elected minister, and was entitled to officiate. The resolutions on which the plaintiff relied have been passed at meetings not duly convened, and therefore not binding on the congregation.

The VICE-CHANCELLOR:—

The legal estate in the chapel is clearly vested in the trustees, for the benefit of the society or congregation assembling therein for public worship. The trustees have not only the legal estate, but it is a duty imposed on them by their acceptance of the trust, to see that the chapel is used for the purposes, and on the trusts declared by the deeds. Except by the intervention of trustees a body of persons, such as form this congregation, could not well have the use and enjoyment of the property for the purposes of worship. One of the primary duties of the trusteeship is to see that the possession, which is legally in themselves, is not improperly disturbed.

The only question really involved in this cause is whether the proceedings of the defendants, of which the plaintiffs complain, amount to an improper disturbance of the legal estate, which it is not denied is in the plaintiffs as trustees.

A minority of the trustees are defendants; but it is well settled that, where the trust is for a public purpose, the opinion of the majority of the trustees must prevail. This principle is essential for the management of such trusts.

In the case of *Wilkinson v. Malin* (a) Lord Lyndhurst said, that in trusts of a public nature, the act of the majority of the trustees is the act of the whole. It had been argued in that case that the principle applied only where the trustees were appointed under some public authority, as under an Act of Parliament, or some public body; but Lord Lyndhurst held that the doctrine was not subject to that limitation.

In every such case it is essential that the majority of the trustees decide in what way the duties incident to the possession of the legal estate are to be exercised.

In this case the defendant Shipway asserts a right to retain possession of the chapel, and to officiate therein as

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(a) 2 Tyr. 571.

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the minister, against the will of the majority of trustees. It is well settled that, at law, where the legal estate in a dissenting chapel is vested in trustees, the minister is the mere tenant-at-will of the trustees. In the case of *Doe v. Jones* (a), it was so held. In the case of *Doe v. M^r Kaeg* (b) Lord Tenterden laid down the same doctrine, and even went so far as to say that the minister was not entitled to a reasonable time to remove his goods; though he adds, "Perhaps, if after the determination of his tenancy, he had entered for the sole purpose of removing his goods, and had continued there no longer than was necessary for that purpose, and did not exclude the landlord, he might not have been a trespasser."

Such, then, is the defendant's position at law. But what is his position in this Court? Dissatisfaction was felt at his continuing to act as minister; and he was served with notice to attend a meeting, at which certain charges were preferred against him. It is not material to consider whether that notice was duly served, or to examine the grounds on which the majority of the trustees proceeded. It is sufficient that the majority of the trustees, honestly in the discharge of their duty, and supported by the opinion of a considerable portion of the congregation, thought that they were bound to close the church against the defendant Shipway for several Sundays. If the conduct of the trustees was wrong, it was open to those members of the congregation who felt aggrieved by that conduct, to call the trustees to account in a regular way. At the regular church meeting on the last Sunday in May, a resolution was passed, that the defendant Shipway should no longer be the pastor. It is said that this meeting was not regularly held. But, assuming that there was a doubt on this point, it is plain that a meeting might have been regularly convened to arrange any dispute or difference of opinion.

(a) 10 B. & C. 718.

(b) *Ibid.* 721—3.

Instead of proceeding in that manner, what took place on the 4th July was highly irregular and improper, and must deprive those who pursued such a course of conduct of the approbation of this Court. On that day the trustees had opened the chapel for Divine service, which was performed in a regular manner. The intrusion of the defendant Shipway and his supporters on that occasion, and their retaining possession of the chapel all night, and then changing the locks, so as forcibly to exclude the majority of the trustees, is as much a violation of the trusts and purposes for which the legal estate is vested in the trustees, as it is a trespass at law upon that legal estate. The majority of the trustees are, therefore, justified in applying to this Court to protect their legal title against this discreditable violation.

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“Decree, that an injunction be awarded to restrain the defendant C. Shipway, his agents and servants, from disturbing, hindering, or molesting the pastor, deacons, and members of the Congregation of Particular or Calvinistic Baptists in the plaintiffs’ bill named, in the performance of Divine service in the said chapel at Sible Hedingham, in the said bill mentioned, or from otherwise disturbing, hindering or molesting, any of the members aforesaid in the employment or use of the said chapel and hereditaments, conveyed by the said indentures of the 21st day of September, 1808, and the 13th day of December, 1814, or either of them, and also to restrain the defendant, C. Shipway, from officiating as pastor of the said congregation, and from preaching or intermeddling with the service to be performed in the said chapel and hereditaments conveyed by the said indentures, and to restrain the defendants, J. Ruggles, W. Barrell, and C. Finch, from in any way aiding or permitting the said defendant, Charles Shipway, to preach or officiate in the said chapel. And

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it is ordered that it be referred to the proper taxing-master of this Court to tax the plaintiffs their costs of this suit, including the costs of the written bill, and to certify the amount thereof. And it is ordered that the defendants, C. Shipway, J. Ruggles, W. Barrell, and C. Finch, do pay the said plaintiffs the said costs when taxed. And this Court doth not think fit to make any order as to the costs of the defendant James Goss; and any of the parties are to be at liberty to apply to this Court as they may be advised.

Affirmed by the Lords Justices on the 7th of June, 1859.

IN THE MATTER OF JAMES CANT'S ESTATE;
 IN THE MATTER OF THE LANDS CLAUSES CONSO-
 LIDATION ACT;
 AND OF THE EASTERN UNION AND HARWICH
 RAILWAY AND PIER ACT, 1847.

April 19.

Re CANT'S ESTATE.

Under a will which directed a sale and conversion of lands into money, a right of pre-emption grafted on the trust for sale was held to be lost by the lands to which the right of pre-emption extended, having been purchased by a Railway Company under their compulsory powers; and the person to whom the right of pre-emption was given was not entitled to the compensation money, subject to the deduction of the price fixed by the testator.

The right of pre-emption being grafted on a trust for sale which was extinguished by the paramount right of purchase by the Railway Company—*Held* that the right of pre-emption fell with the trust on which it was grafted.

household furniture, stock and trade, and the profits of his business, which he directed his trustees to carry on for her benefit, during the term of her natural life; and within four months after her decease, he directed his executors, or the survivor of them, to stand possessed of all his real and personal estate, in trust to sell and convert the whole thereof into money; and the monies arising from such sale, and the debts due and owing at his wife's decease and all his other property whatsoever as aforesaid given, he directed his executors, after payment of the expenses of carrying the trusts of his will into execution, his debts and other expenses incident to the execution of his will, to divide into ten equal parts, and when so divided, he gave one-tenth part to each of his ten children (naming them), and then followed these words:

“ Provided always nevertheless, and my mind and will is that the said G. L. Cant and J. Wright (the trustees), or the survivor of them, or the heirs, executors, or administrators of such survivor, previous to selling and disposing of the garden I purchased of the assignees of John Golding, and also the garden formerly Mr. Burton's, shall offer both the said gardens to my son Charles Cant at the sum of 450*l.*, and shall also offer the house and bake-office now in the occupation of my son William Cant in Lawford, to him, my said son, William Cant, at the sum of 200*l.*; and if either my said son Charles Cant shall be desirous of purchasing my said gardens at the sum of 450*l.*, or my said son William G. Cant shall be desirous of purchasing my said house and bake-office at the sum of 200*l.*, and shall each of them, or either of them, give to the said George Long Cant and James Wright, or the survivor, or the heirs, executors, or administrators of such survivor, three calendar months' notice in writing, such three calendar months' notice to be computed from one calendar month next after the decease of my said wife, of such his or their desire to purchase them on payment of the respec-

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tive purchase-monies, or of the purchase-money of such of my said sons as shall have so given notice of his intention to purchase, at the expiration of such notice or notices, I hereby direct the said George Long Cant and James Wright to stand possessed of the said gardens and bake-office, in trust to convey the same to either of my said sons, Charles Cant and William Cant, or such of them from whom they shall receive such notice as aforesaid. And in the event of their not receiving such notice or notices as aforesaid, or of the said purchase-money, or purchase-monies not being paid or ready to be paid at the expiration of such notice or notices, then that the said George Long Cant and James Wright, or the survivor of them, or the heirs, executors, or administrators of such survivor shall stand possessed of the said gardens, house and bake-office in trust to be sold in manner hereinbefore directed * *

* * And further, my mind and will is, that in the event of my said sons, Charles Cant and William Cant, or either of them purchasing the said gardens, house, and bake-office, the tenth part or share so hereinbefore directed to be paid and given to them my said sons, Charles Cant and William Cant, or such of them as shall be so inclined to purchase, shall be taken and considered as a part of his or their purchase-money or purchase-monies, and be allowed to him or them the said Charles Cant and William Cant, or the survivor of them, or the heirs, executors, or administrators of such survivor, out of the said consideration money or consideration monies at the time of the execution of the conveyance or respective conveyances to him or them."

Prior to his death, and to the date of his will, the testator caused eight cottages to be erected on the land, which were let for 40*l.* per annum. The testator died on the 13th of July, 1828. At his death his real estate, including that part of his lands sold to the Railway Company, was subject to certain mortgages, which, by a deed dated the

31st of July, 1847, were paid off and one mortgage effected for 430*l.* to a Mr. May.

In the year 1853 the Eastern Union Railway Company, under their compulsory powers, took the two pieces of garden ground, and the eight cottages standing thereon, for which they paid into the Bank 550*l.* for the cottages, and 700*l.* for the land, making 1250*l.*, out of which by an order of his Honour, dated the 12th day of June, 1854, the mortgage for 430*l.* was paid off, and the residue was carried to the account of Hannah Cant, George Long Cant, and James Wright, trustees of the will of James Cant, late of Manningtree, deceased. It was also ordered that the money should be invested, and the dividends paid to the widow. By a deed dated the 31st of December, 1854, the land and messuages were conveyed to the company. The company also paid Charles Cant, who was in occupation of the garden 295*l.* compensation.

On the 30th of May, 1855, the Railway Company offered for sale by public auction as surplus lands, part of the premises taken by them, amounting to 2 roods 19 perches, which were purchased by Charles Cant.

James Wright, the trustee, died on the 20th of April, 1856, and the widow, Hannah Cant, died on the 27th of January, 1859.

On the 5th of February, 1859, Charles Cant addressed to Mr. George Long Cant, the surviving trustee and executor, the following notice :

“Mr. George Long Cant, Manningtree, mariner,

“I, the undersigned, Charles Cant, of Manningtree, in the county of Essex, market gardener, do hereby give you notice, as the surviving executor and devisee in trust of, and acting under the will of James Cant, formerly of Manningtree, aforesaid, gardener, deceased, that I am desirous of purchasing the gardens and hereditaments in the said will mentioned as the garden purchased of John Golding ; and also the garden formerly Mr. Burton's, in Manningtree

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and Mistley, in the said county, or one of such parishes, the right to purchase which, at the sum of 450*l.*, is by the said will given to me. And forasmuch as the said gardens were some time since purchased by the Eastern Railway Company, and conveyed to them by Hannah Cant, the tenant for life under the powers and provisions of the Lands Clauses Consolidation Act, 1845; and the purchase money thereof has been paid into, and is now in the Bank of England, and there stands invested, I hereby further give you notice that I claim all such purchase-money, on paying to you the sum of 450*l.*; which said last-mentioned sum I am ready to pay at any time within a month from this date, on any reasonable appointment made by you to receive the same, and to transfer the said purchase-money into my name."

George Long Cant, by an indenture dated the 21st of August, 1857, in consideration of 45*l.*, assigned his tenth share in the said money paid into court, and represented by 882*l.* 18*s.* 2*d.* Consols to David Mustard in trust, in the first place to pay the costs of a petition to the Court for payment of the said tenth share in the said sum; and in the next place to retain the said 45*l.*; and after such payment on trust, to pay the balance to the said George Long Cant.

George Long Cant and David Mustard presented this petition for payment of the said sum of 882*l.* 18*s.* 2*d.* Consols to the said George Long Cant, or that it might be distributed among the parties beneficially entitled.

Charles Cant, in an affidavit, deposed that he had always intended to become the purchaser of the land.

Argument.

Mr. Bacon and Mr. Shebbeare, for the petitioner, George Long Cant, and his mortgagee, David Mustard.

There were two questions: first, whether the right of pre-emption extended to the ground on which the cottages

were built; and secondly, whether, in the events that happened, it was capable of being exercised at all.

First, then, the word gardens would include only what was garden ground at the date of the will; and the ground which had been made the site of the cottages did not come within the description; more particularly as it is obvious the testator intended the property he gave as gardens to be used as garden-ground.

Secondly, the testator's intention was to give his son Charles the right to acquire the specific thing, in order that he might carry on the business; but the subject of the gift was withdrawn from the trustees before the time for claiming the right had arrived. The trustees were to offer the land, but they had no more the power of offering the land for sale to Charles Cant, than he had of effecting the purchase.

Again, the testator had given his son the right of purchasing the property at its full value; but that was not the same thing as the right to purchase 1250*l.* for 450*l.*

Mr. H. F. Shebbeare, for the children of the testator, other than the petitioner, Charles Cant.

The main object of the will was to give equal interests to all the children, and the right of pre-emption was not intended to interfere with that principle. The object was simply to give Charles the garden-ground, that he might use it as a garden, not that he might sell it at profit. To give him a larger pecuniary interest than the other children, would be to contravene the intention of the testator.

Mr. De L. Giffard and *Mr. Millar*, for Charles Cant.

The language of the will must be taken as conclusive of what the testator intended, without having recourse to parol evidence. His language is, "all the gardens which I purchased of the assignees of Golding," and the convey-

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ance would show what that was. Suppose the testator had built houses over the whole of the land, that could not effect the gift. It would be a mere change of the surface of the devise. Secondly, the right of pre-emption was not destroyed, because there had been a change in the quality of the property. The money paid into court, represented the land for every purpose of the will. [The VICE-CHANCELLOR.—The right of pre-emption is *in specie*; you must show that Charles Cant can now purchase the specific thing.] The Railway Act cannot alter the rights of the parties. Suppose a landowner had given another an option to purchase land at a specified time, and before it was exercised the land was taken by a railway company—could the landowner put the whole price in his pocket? [The VICE-CHANCELLOR.—You had a right on certain conditions, but why are the other children to lose their chance of your failing to exercise the right of pre-emption?] The testator only intended them to have 450*l.*, and that they will get, or have got. This case could not be distinguished from the common case, where land, which a landowner had contracted to sell, was taken by a railway company. Charles Cant always intended to become the purchaser of the land at the price fixed by the testator, and why was his right to be defeated?

Mr. Bacon was heard in reply.—The *Lands Clauses Act*, and *Ex parte the Precentor of St. Paul's* (a) were cited.

The VICE-CHANCELLOR said, he had no doubt that the testator intended the right of pre-emption to be exercised only as to the gardens; as to the other point he would reserve his judgment.

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Judgment.

The VICE-CHANCELLOR:—

A question of some difficulty has been raised, by the petition in this case, as to a right of pre-emption given by the testator to one of his sons.

(a) Not reported.

It has been contended, on behalf of Charles Cant, that notwithstanding the compulsory sale to the railway company, he is now entitled to exercise the right of pre-emption, not of the gardens, but of the 750*l.* for the sum of 450*l.*

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It has been argued that under the will he is entitled to a certain benefit on payment of 450*l.*; that he now submits to pay the money, and claims to have the benefit; that the right given by the will, is a right to have the ground at the prescribed price; and having this right to the ground, he is, according to the language of the Lands Clauses Act, entitled to the money into which the ground has been converted; and that it is contrary to principle, and to the terms of the Act of Parliament, that the compulsory conversion of the land into money, should take away any right or beneficial interest in the land so clearly given by the will.

But the benefit which the testator gave, was only a choice to purchase one specific thing, when it came to be sold under the general trust for sale. It has, however, happened that, as to that particular property, the trust for sale never can come into operation, because it has been purchased by another person under a paramount right. Therefore, the right of pre-emption of the garden being destroyed, whatever benefit was to accrue from it must be lost, unless the testator has shown an intention to give the benefit in such a shape as to extend to the purchase-money paid by another purchaser. According to the language of the will, the essence of the benefit is the right of the pre-emption. And the testator has guarded and restricted that benefit, by imposing certain formalities as to the time and mode of notice, and by an express direction to sell to some other person, unless the purchase-money was ready at the time prescribed.

It appears that the son was a gardener, and the plain intention of the testator was to give to him the choice of enjoying the garden *in specie*, upon payment of the speci-

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fied sum. The garden itself, and not any sum of money which might represent its value, was the substance of the benefit given by the right of pre-emption.

No doubt, if the son purchased the gardens, at the price of 450*l.*, he would have acquired a right to sell them to any other person, at any price, however large.

But there is no indication of any intention that he should have a right of pre-emption for any such purpose, or of any intention that he should enjoy the benefit in any other shape than that of the garden in which to carry on his trade.

The benefit to arise from any subsequent sale, would be produced by his own act, and not by any direction of the testator.

A clear and imperative trust for sale, is created by the testator. That trust is the leading purpose of his will, to effect a conversion into money, to be distributed between Charles Cant and his other children. Upon that trust the right of pre-emption is grafted, and when the trust itself has been extinguished by the paramount right, it would seem that the benefit intended by the right of pre-emption must fall with the trust on which it was grafted.

The argument founded on the Lands Clauses Act, and on the right of the persons beneficially interested under the will to have the money laid out in the purchase of other lands to be conveyed to the trusts of the will, does not help the claim to the 750*l.*, on payment of 450*l.*

If the money were now invested in other lands or other gardens upon the trusts of the will, and subject to the trust for sale, how could the right of pre-emption for 450*l.* be applied to any other lands or gardens? The right of pre-emption is so entirely specific, as to the gardens devised by the testator, that it could be applied to no other garden. Nor can the event ever now occur upon which the right of pre-emption was to arise.

The mere gift of this benefit grafted on an extinguished trust, is guarded by such strict and specific conditions, as to the mode of obtaining the benefit, that there seems nothing to warrant the construction, that it amounts to an actual devise of the garden itself, on condition of paying 450*l*.

To treat the gift of an option to purchase at the price of 450*l*., as an absolute devise of the gardens, on condition of paying 450*l*., is not consistent with the intention to be collected from the language of the will. The language very plainly indicates that if the conversion into money was effected by a sale to any other person than Charles Cant, the extent of the benefit to him was to be only his one-tenth of the money.

Unless by actual purchase and conveyance to him in the manner and on the conditions particularly prescribed by the will, there are no words which give him a right to any thing in respect of the gardens, except his share of the money to be produced by the conversion.

The right to enjoy a benefit, clearly described by a testator, must depend on the existence of the subject, as well as of the object of the gift. In this case, the subject is a right absolutely specific, and given in terms so entirely specific, as to exclude any manifestation of intention to confer a right to any substitute or equivalent for the specific thing.

There must, therefore, be an order for payment of the compensation money, in equal tenth shares, according to the will.

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March 19th.

EDDELS v. JOHNSON.

A testator, having given to each of his six children a freehold estate, made a second devise to two of the children, and then gave, devised, and bequeathed all the residue of his real and personal estate unto his said four children, naming three only.—

Held, that all the four children (other than the two) were entitled.

The will contained specific bequests and devises, and a residuary gift of real and personal estate, but did not charge the real estate with the debts; and the personal estate not specifically bequeathed, proving insufficient—*Held*, that the real and personal estate specifically given were to be applied, rateably with the residuary real estate, in payment of the testator's debts.

Where the will omits to charge the real estate with payment of debts, the real estate, whether devised specifically or in the form of residue, is to be applied in payment of all debts; and the late Wills Act, 7 Wm. 4 & 1 Vic. c. 26, does not affect this charge.

JAMES CREED EDDELS, of Kent Villa, Finchley New Road, Hampstead, Middlesex, by his will, dated the 6th of August, 1853, gave and devised as follows:—

I give and devise all my freehold messuages or tenements, lands, and hereditaments, situate and being in the Vale in Ramsgate, in the county of Kent, and hereinafter particularly enumerated, unto my dear wife Emma Marina, my daughter Emma Wilmot, and Mr. Charles Johnson, of Charles Street, Middlesex Hospital, gentleman, and their heirs, upon the uses, trusts, intents and purposes, and with and subject to the powers, provisions, conditions, and limitations hereinafter mentioned and expressed of or concerning the same, that is to say, as to the messuage or tenement, and dwelling house, with the ground, offices, and appurtenances belonging thereto, called Glanmire House, to the use of my daughter Clara Elizabeth, for and during her life, and immediately after her decease to the use of any husband with whom she may intermarry and surviving her, during his life; and after his decease, to the use of such person or persons as my said daughter shall, by her last will and testament, direct or appoint, and in default of such appointment, to the use of the heirs of her body, and for default of such issue, to the use of my own right heirs for ever. And as to the messuage or tenement and dwelling house, with the ground, offices, and appurtenances belonging thereto, called Royal Villa, to the use of my said daughter Emma Wilmot, for and during her life; and immediately

after her decease, to the use of any husband with whom she may intermarry and surviving her, during his life ; and after his decease, to the use of such person or persons as my said daughter Emma Wilmot shall, by her last will and testament, direct or appoint, and in default of such appointment, to the use of the heirs of her body, and for default of such issue, to the use of my own right heirs for ever. And as to the messuage or tenement and dwelling house, with the ground, offices, and appurtenances belonging thereto, called Chandos Cottage, to the use of my dear wife Emma Marina, until my daughter Thirza shall arrive at the age of twenty-one years, or marry, which shall first happen ; but from and after the arrival of my daughter Thirza to the age of twenty-one years, or her marriage, which shall first happen, to the use of my said daughter Thirza for and during her life, and after her decease, to the use of any husband with whom she may intermarry, surviving her, during his life, and after his decease, to the use of such person or persons as my said daughter Thirza shall, by her last will and testament, direct or appoint ; and in default of such appointment, to the use of the heirs of her body, and for default of such issue, to the use of my own right heirs for ever. And as to the messuage or tenement and dwelling house, with the piece of ground or land, offices, and appurtenances belonging thereto, and situate next adjoining Chandos Cottage aforesaid, and now in the occupation of Mr. Gwyn, to the use of my said dear wife Emma Marina, until my son Edgar shall arrive at the age of twenty-one years ; and from and after his so arriving at the age of twenty-one years, to the use of my said son Edgar for and during his life ; and after his decease, to the use of such person or persons as he shall, by last will and testament, direct or appoint ; and in default of such appointment, to the use of the heirs of his body, and for default of such issue, to the use of my own right heirs for ever. And as to the messuage or tenement and dwelling

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house with piece of ground or land belonging thereto, and the appurtenances, called Clarence Villa, to the use of my said wife Emma Marina, until my son Frederick shall arrive at the age of twenty-one years; and from and after his arriving at the age of twenty-one years, to the use of my said son Frederick for and during his life; and after his decease, to the use of such person or persons as he shall, by last will and testament, direct or appoint; and in default of such appointment, to the use of the heirs of his body, and for default of such issue, to the use of my own right heirs for ever. And as to the messuage or tenement and dwelling house with the piece of ground or land, offices, and appurtenances belonging thereto, now known as number 16, Royal Terrace, to the use of my said wife Emma Marina until my son Arthur shall arrive at the age of twenty-one years; and from and after that period to the use of my said son Arthur for and during his life, and after his decease, to the use of such person or persons as he shall, by last will and testament, direct or appoint; and in default of such appointment, to the use of the heirs of his body, and for default of such heirs, to the use of my own right heirs for ever. And as to the nine messuages, tenements, hereditaments, and dwelling houses, with the several pieces or parcels of ground or land, whereon the same are built, called Victoria Terrace, together with the enclosed pleasure grounds called the Vale Gardens in front thereof, and also a messuage or hereditament and land called Memel Lodge, to the use of my said dear wife Emma Marina for the term of her natural life; and from and after her decease, to the use of my said six respective children in equal shares, in like manner as is declared with respect to each child, with respect to the several hereinbefore mentioned devises to each of them respectively, with the ultimate use of my own right heirs for ever. I give and bequeath to my said dear wife Emma Marina, my said daughter Emma Wilmot, and Mr. Charles Johnson, all

that messuage or tenement, hereditaments, and premises, called Kent Villa, Finchley New Road, St. John's Wood, in the parish of Hampstead, where I now live, upon trust, after payment of ground rent, and the observance of the covenants of the lease whereupon the same is held, to permit my said wife Emma Marina to receive the rents, issues, and profits thereof during her life, and after her decease, in trust for all my said children equally, share and share alike, as tenants in common. I give and bequeath all my furniture, plate, linen, china, jewellery, wine, trinkets, and all other chattels and effects in my house or elsewhere belonging thereto, to my said wife absolutely. I give and bequeath my business house, No. 34 in Piccadilly, and the lease thereupon, together with all my stock in trade, book debts, fixtures, and other effects therein, subject to the payment thereof of all the trade accounts and liabilities thereon, to my said two sons Edgar and Frederick, as tenants in common as to the lease, and equally between them as to the other effects; and my desire is, that they should carry on and continue the said business, and enter into copartnership together. I give, devise, and bequeath all the residue and remainder of my real and personal estate unto my said four children, Clara, Elizabeth, Emma Wilmot, and Arthur, equally as tenants in common as to my real estate, and to share and share alike as to my personal estate; and I hereby declare that every devise and bequest to a daughter or daughters shall be independently of any husband with whom she or they may intermarry; I desire that the produce of a policy of insurance upon my life for 3000*l.* shall be applied at once in repaying Mr. White a mortgage sum of 3000*l.*; and another mortgage sum of 2000*l.* shall be paid, as well as all my other debts out of the most convenient portion of my residuary personal estate.

The testator then gave the usual powers to the trustees for investment and indemnity, and appointed his trustees executrixes and executor.

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The testator died on the 4th of April, 1857, without having altered his will, which was proved on the 2d of July, in that year. He left him surviving, his widow Emma Marina, and six children, viz., Clara Elizabeth, the wife of Mr. Charles Johnson, Emma Wilmot, Thirza, Edgar, Frederick, and Arthur, of whom the four last were infants.

In the original draft will, the four names in the residuary gift were correctly set out, but in the will executed, the name of Thirza was inadvertently omitted.

The whole of the personal estate, except that specifically bequeathed, was applied by the executors and trustees in payment of a portion of the debts, but was insufficient for that purpose, and there still remained due about 850*l*. Under these circumstances, the plaintiffs, who were two of the executrixes and trustees, filed this bill, praying that the rights of the children under the will might be declared, and that the testator's estate might be administered, and a sufficient portion of the real estate might be sold, for payment of such of the debts as were still unpaid.

Argument.
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Mr. *De Longueville Giffard*, for the plaintiff.

The first question raised on this will, is on the construction of the residuary gift. One construction would be, to read the word "four" as "three," in which case there would be no ambiguity in the will, and for which view there could be found sufficient authority if necessary. There was, however, a reported case so clearly resembling this, that it would be sufficient for the trustees to mention it, and submit the point to the judgment of the Court. *Humphreys v. Humphreys* (a).

Mr. *Smythe*, for Thirza, the child whose name was omitted, contended that, from the whole of the will, it was

(a) 2 Cox, 184.

obvious that the testator intended, after having given a specific devise to Edgar and Frederick, that the other four should take the residue. In *Humphreys v. Humphreys*, the testator gave the general residue of his personal estate among his seven children, naming only six. He had, in fact, eight, but it appearing that one of the two omitted children was sufficiently provided for elsewhere, the Court held that the other seven were entitled. That case could not be distinguished from the present.

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The VICE-CHANCELLOR.—Looking at the whole of the will, it is sufficiently clear that the testator intended that the four children other than Frederick and Edgar, should take under the residuary gift. It is true he mentions only three names, but he says that the gift is to *four*, and the context shows that the four whom he meant are all that remained, excluding Frederick and Edgar.

Mr. De L. Giffard.—The remaining question is, out of what source the debts are to be paid. The whole of the personalty, not specifically bequeathed, has been applied towards payment of the debts, but there still remains due a balance of between 800*l.* and 900*l.* It was settled that specifically bequeathed personal estate stands on the same footing as a specific devise of real estate: *Tombs v. Roch* (a). The question there was whether, as between realty and personalty specifically devised, and residuary real estate, the latter was not primarily liable for debts, even before the late Wills Act (b). Where legacies were charged generally on real estate, it was held by the House of Lords, reversing the decree of the Court of Exchequer (c), that residuary real estate was liable for legacies in priority to real estate specifically devised: *Spong v. Spong* (d). Some doubt had been thrown on this decision, and Lord St. Leonards, (e) who had been counsel in the

(a) 2 Coll. C. C. 490.

(d) 3 Bligh, N. S. 84.

(b) 7 Wm. & 1 Vic. c. 26.

(e) "Law of Property," 422.

(c) 1 Y. & J. 300.

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case, observed, that all that case decided was, that the real estate specifically devised, was not chargeable with the legacies; but Lord Cottenham, in *Mirehouse v. Scaife* (a), regarded it as deciding the question of priority. Since the Wills Act, there was no longer any distinction between residuary real and personal gifts. Before that Act it was said that every devise, whether in terms specific or residuary, was in fact specific, because the will, taking effect from the date as to real estate, the residuary real estate was as definite as that specifically given. This doctrine was the ground of the distinction between residuary real and personal estate, but since the late Act, by which the will spoke from the death, the distinction no longer existed; it was submitted, therefore, there ought to be a uniform rule of administration. [The VICE-CHANCELLOR.—The Act of 3 & 4 Wm. 4, c. 104, makes *all* the real estate assets for the payment of debts.] That Act was passed merely to supply the omission of a testator who had not charged his real estate with payment of his debts. All the Act did was to supply that defect, but it never was intended to vary the priority of charges, and in fact it preserved the priority of specialty creditors.

Subjoined is the Act 3 & 4 Wm. 4, c. 104.

“An Act to render Freehold and Copyhold Estates Assets for the Payments of Simple and Contract Debts.

“29th August, 1833.

“Whereas, it is expedient that the payment of the debts of all persons should be secured more effectually than is done by the laws now in force; be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the

Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the authority of the same, That from and after the passing of this Act, when any person shall die seized of, or entitled to any estate or interest in lands, tenements, or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customary hold, or copyhold, which he shall not by his last will have charged or devised, subject to the payment of his debts, the same shall be assets, to be administered in Courts of

(a) 2 M. & C. 695, 704.

Mr. *Smythe* and Mr. *T. F. Morse* were not called on.(a)

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Judgment.

The VICE-CHANCELLOR :—

In this case there is no charge of debts contained in the will, and the creditors can only reach the real estate by virtue of the Act 3 & 4 Wm. 4, c. 104. I do not understand the late Wills Act to have made any change in the law which made real estate assets for the payment of debts. The Act 3 & 4 Wm. 4, says, that all lands are to be assets, whether in the hands of the heir or devisees, but I am asked to hold that one part of the real estate is not to be charged with debts, and reference is made to cases in which the testator has charged his legacies on his real estate. There is no analogy between the two things. I understand it to be completely settled that every devise of real estate, whether particularly described or residuary, is specific, and that in a case where the will contains no charge of debts on the real estate, and where there are specific gifts of realty and personalty, and also a gift of

Equity for the payment of the just debts of such persons, as well debts due on simple impost as on specialty; and that the heir or heirs-at-law, customary heir or heirs, devisee or devisees of such debtor, shall be liable to all the same suits in equity at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir or heirs-at-law, devisee, or devisees of any person or persons who died seized of freehold estates was or were, before the passing of the Act, liable to, in

respect of such freehold estates, at the suit of creditors by specialty, in which the heirs were bound: Provided always, that in the administration of assets by Courts of Equity, under and by virtue of this Act, all creditors by specialty, in which the heirs are bound, shall be paid the full amount of the debts due to them, before any of the creditors by simple contract or by specialty, in which the heirs are not bound, shall be paid any parts of their demands."

(a) See *Bench v. Biles*, 4 Mad. 187; *Harris v. Clemom*, 1 Kay, 435; *Harris v. Watkins*, ib. 438; *Wheeler v. Howell*, 3 K. & J.

198; *Edwards v. Pugh* (coram Wood, V.C.), not reported, 7th of June, 1853, fo. 1075.

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residuary real estate, that the real and personal estate specifically given, and the residuary real estate, must contribute rateably to the payment of debts. It cannot reasonably be held that because a testator has given a real estate to one person, and the rest of his real estate to another, that the former is to bear no part of what the statute says shall be borne by all.

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 April 21.

JACKSON v. WARD.

Where a sole plaintiff died after decree, the Court made *ex parte* the supplemental order, under the 52d section of 15 & 16 Vic. c. 86.
 The 52d section is applicable to every case where there has been a transmission of interest, by the death of a plaintiff or defendant, in a suit.

MR. *W. H. Terrell* moved for the usual supplemental decree under the 52d section of 15 & 16 Vic. c. 86, in consequence of the death of the sole plaintiff. The bill had been filed to restrain waste, and a decree taken by consent, for the plaintiff, with costs of suit. After the decree, on the 3d of December, 1858, the plaintiff died, having devised her real estate to her son, and bequeathed certain legacies, and the residue of personal estate to her daughter Margaret, who was the wife of a Mr. Brockman, whom the plaintiff, conjointly with another who declined to act, appointed her executor.

There seemed to be some difference of opinion among the judges, as to the practice under the 52d section of the Act. In *Lowe v. Watson* (a), his Honour held that a devise by a defendant, was a transmission within the Act, but in *Dendy v. Dendy* (b), Vice-Chancellor Wood refused to make the order, on the death of a sole devisee. In the case of *Moritt v. Walton* (c), Vice-Chancellor Kindersley made the common order to revive on the death of a sole plaintiff, after decree.

(a) 1 Sm. & G. 123. (b) 5 W. R. 221. (c) 2 W. R. 544.

The VICE-CHANCELLOR:—

The language of the 52d section is general, and applicable to every case, where there has been a transmission of interest, by the death of a plaintiff or defendant. In *Lowe v. Watson*, I stated, after consultation with the other judges that the order is *ex parte*, and of course, but is liable to be discharged by those against whom it is improperly obtained.

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—
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IN THE MATTER OF J. H. WELCHMAN AND ANNA
MARGARETTA, HIS WIFE; AND THE TRUSTEE
RELIEF ACTS.

April 29.

BY an indenture, dated the 22d July, 1806, the petitioner, Anna Margaretta, one of the six children of Thomas Brabazon Aylmer, was entitled, in expectancy, on her father's death, to one sixth equal share in two sums of 5000*l.* Three per Cent. Reduced, and 1984*l.* 12*s.* 3*d.* Three per Cent. stock, which were standing in the names of trustees upon trusts declared in such indenture.

On the 11th January, 1847, Anna Margaretta married John Henry Welchman, and by him had one child, Frederick Aylmer Welchman, who is now living. There was no settlement made on the marriage.

By an indenture dated the 4th March, 1848, between J. H. Welchman and Anna Margaretta, his wife, of the first part, and Charles Aylmer, of the second part, the petitioner and her husband mortgaged the wife's interest in the said sums of stock to secure three Brazilian bonds then of the value of 300*l.*

In 1852, J. H. Welchman purchased of Mr. Wil-

Where a wife had joined in the assignment of her reversionary interest in a fund to satisfy a debt due from her husband, and the assignee became entitled in possession, the Court ordered the whole to be settled, it appearing that the husband, though living with the wife, was unable to contribute to her support, and that the dividends, together with other property of the wife (not derived from the husband) was not more than sufficient to maintain her.

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liam Parton the goodwill of a business of a wine-merchant at Bayswater, at the price of 800*l*. Welchman conducted the business for some time, and the purchase-money not having been paid, and the interest having fallen into arrear, Parton pressed Welchman for payment. In this state of things, by a deed, dated the 30th June, 1854, reciting that Welchman and his wife had agreed to sell the wife's share in the said two sums of stock for 422*l*., Welchman assigned the same absolutely to William Parton, subject to the mortgage for the Brazilian bonds; no money was in fact paid by Parton, but the amount specified was struck off Welchman's debt. Welchman also assigned a policy on his own life by way of security.

On the 18th November, 1854, Parton gave notice of the assignment to the trustees, and subsequently took possession of the business, and sold it.

On the 17th November, 1855, Welchman was adjudicated a bankrupt.

On the 19th June, 1858, Thomas Brabazon Aylmer died, and the petitioner immediately sent a notice to the trustees claiming her share in the trust money.

On the 31st of January, 1859, the present trustees of the fund, Messrs. Scottard and Aylmer, after having by the direction of the husband and wife, paid off the mortgage for 300*l*., paid the balance, amounting to 800*l*., into court, under the Trustee Relief Act.

Mrs. Welchman now presented a petition, praying that a proper settlement of the whole or part might be made. William Parton also presented a cross petition, claiming to be entitled to the fund.

It was admitted that the husband and wife were living together.

Mrs. Welchman deposed as follows, and her husband also made an affidavit in support of the wife's claim :—

12. "Since the month of July, 1854, and up to the present time, I was, and still am supported by my friends, and

have from time to time stayed with friends; my said husband has been unable in any manner to afford me or our child any means of support.

17. "My said husband is not engaged in any business or calling, and has no means of maintaining, and does not in fact maintain me and my child.

18. "I have one child only now living, and my only means of support consists of the annual sum of 26*l.* arising from the dividends on the sum of 910*l.* 14*s.* 6*d.* new 3 per Cent. Consols, in which I have a life interest under the will of T. B. Aylmer.

19. "No settlement was made on me by my said husband on the occasion of our marriage, and no settlement has since been made by him on the said child of our marriage."

Mr. *Bacon* and Mr. *H. C. Ward*, for Mrs. Welchman, contended that the assignment by this lady and her husband was, in law and fact, the act of the husband, and could not bind the wife. When the case was freed from that circumstance, it became the ordinary one of a wife, whose husband was unable to maintain her, claiming to have a fund, to which she was entitled in her own right, settled on herself. With regard to the amount, the whole fund added to the wife's other property, would not be sufficient to maintain her in her proper station.

Mr. *Roxburgh* appeared for the trustees.

Mr. *Shebbeare*, for the assignee, who had presented a separate petition.

The only cases in which the Court could settle the whole of a considerable fund, were where the wife had been deserted by her husband, or under some special circum-

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stances of destitution. In the absence of special circumstances, the rule was to settle one-half upon the wife and children: *Bagshaw v. Winter* (a). In *Vaughan v. Buck* (b), where the husband, a bankrupt, had deserted his wife, having previously obtained 2000*l.*, to which she had been absolutely entitled, the Court directed only two-thirds of 270*l.* per annum to be paid to her, and gave the other third to the assignees of the husband. In *Scott v. Spashett* (c), where the whole fund had been settled, Lord Truro did so expressly, on the ground, that the husband had received of the wife's property double the amount then in question.

In the case of *Ex parte Pugh* (d), out of a fund of 681*l.*, the Court directed the costs of the petitioner, who was the surviving assignee of a creditor's deed, and of the husband's assignees in bankruptcy, to be paid out of the fund, 400*l.* to be settled on the wife, out of which her costs were to be paid, and the petitioner to have the residue.

Judgment.

The VICE-CHANCELLOR :—

It is quite true that, in many of the cases in which the Court has ordered the whole fund to be settled, there was the circumstance that the wife was deserted by her husband. Here there is no desertion. But, in my opinion, it is not essential to the claim of the wife to have the whole fund settled upon herself and her children, that she should be deserted by the husband. What the Court has to do, is to consider whether the whole income, from whatever source derived, is sufficient to provide her with reasonable means of subsistence. In this case, the dividends of the 900*l.* stock, to which she is entitled, not from her husband, but accruing to

(a) 5 De G. & S. 466.

(b) 1 Sim. N. S. 284.

(c) 3 M. & G. 599.

(d) 1 Drew, 202.

him in her right, added to the dividends of the 800*l.*, which is at present in question, make altogether a very slender provision for the wife, and, therefore, the whole fund must be settled. Although the husband and wife are living together, it appears that the husband is not only wholly unable to maintain her or even to contribute to her support, but on the contrary is a burden upon her. The whole fund must, therefore, be settled in the usual way.

The costs of all parties were ordered to be paid out of the fund.

1859.

In re J. H. WELCHMAN AND ANNA MARGARETTA HIS WIFE; AND THE TRUSTEE RELIEF ACTS.

Judgment.

PENDLETON *v.* ROTH.

SAMUEL ROTH, the elder, on the 13th April, 1776, was seized of one undivided third part in certain real estate at Newmarket, in the county of Derby. At the same date John Barker was seized of the remaining two undivided third parts in the same property, subject to a mortgage to one Gregory. By indentures of lease and release, dated the 12th and 13th of April, 1776, between Gregory of the first part, Barker of the second part, and Samuel Rooth of the third part, the said property was released to Samuel Rooth, the elder, subject to a proviso for redemption by, and reconveyance to, John Barker, his heirs and assigns, on payment of 240*l.* and interest.

John Barker, by his will, dated 6th March, 1777, devised his real estate to his widow, with power to sell the

gave him an absolute right to the estate, to the exclusion of the devisees in remainder under the will of the mortgagee, who had, as mortgagee, been more than twenty years in possession.

Feb. 22.
May 31.

Mortgagee in fee in possession for more than twenty years having devised the estate to his son in tail with limitations over — *Held*, that an acknowledgment by the tenant in tail of the mortgage title restored the right of redemption so as to bind the remainderman, and that a purchase of the equity of redemption by him, and conveyance of it to him in fee,

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same, or so much as should be required to pay debts, and gave the residue, and all his personal estate to her for life or marriage; and after her decease or marriage, he devised the residue of his real estate to John Walter and his heirs, on trust to sell the same, and out of the proceeds to pay to each of his children, Samuel, Ann, Elizabeth, Mary, and Joseph, certain sums named in the schedule of the will, and the residue among his said children, share and share alike; and he appointed his wife sole executrix.

John Barker died on the 7th of March, 1777, leaving his widow and five children, of whom Samuel died, leaving his brother his heir-at-law, and the sisters, who intermarried with Messrs. Parker, Wild, and Amos, respectively.

Joseph Barker, in 1793, assigned all his interest under his father's will to one John Bower.

In 1782, Samuel Rooth brought an action in ejectment against Mrs. Barker, who was in possession of the hereditaments, and obtained possession, which he retained till his death.

Mrs. Barker subsequently married one Henry Baggaley.

Samuel Rooth, the elder, by his will, dated the 18th of April, 1805, gave unto his son Samuel Rooth (the younger) his heirs and assigns, the said premises, describing them as "All those my messuages, cottages, houses, lands, tenements, hereditaments, and premises, with the appurtenances thereunto belonging, situate, standing, lying and being at Newmarket aforesaid, and now in my occupation, subject to the payment thereof by his said son of a legacy of 1000*l.* to the testator's daughter Elizabeth, and an annuity to his wife Elizabeth; and the testator further gave and bequeathed to his said son, Samuel Rooth, the younger, certain other hereditaments situated respectively at Henmoor, Ainmoor, and near to Clay Cross, therein

described, and all the residue of his personal estate and effects; and the will then directed that all his debts and funeral expenses should be paid by his son Samuel, and then proceeded as follows:—

“ But if my said son, Samuel Rooth, happen to die without issue, then I give, devise, and bequeath the said houses, lands, tenements, and hereditaments and premises, with the appurtenances thereunto belonging, situated and standing, and being at Newmarket, Henmoor Airmoor, and near to Clay Cross, as before mentioned, unto my son Jeremiah Rooth, his heirs and assigns for ever, he paying unto each of his two sisters Mary and Elizabeth the sum of 250*l.* each of good and lawful money of Great Britain; but if either or both of them, my said daughters, happen to be dead, leaving a lawful child behind them, then the said child or children shall represent their respective parents, and receive their respective shares. And I further will and order, that he shall pay the before-mentioned annuity or rent-charge unto his mother, my wife, Elizabeth Rooth, during the term of her natural life, as aforesaid, and also all my just debts, legacies, funeral expenses, as before charged on the said estates. But if it so happen that both my sons die without heirs, then I give, devise, and bequeath all my real and personal estates, of what nature or kind soever, or wheresoever, unto my two daughters, Mary and Elizabeth, their heirs and assigns for ever, share and share alike, subject to the said annuity or rent-charge of 30*l.* during the life of my said wife.”

The testator appointed Samuel Rooth the younger, and his widow, executor and executrix of his will. Samuel Rooth, the elder, died on the 27th of April, and his will was proved by his widow. At his death the 240*l.* was due on the mortgage, but there was no specific bequest of the said sum. On her death, Samuel Rooth the younger

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entered into possession, and paid off all the debts, &c., and remained in possession until his death.

In 1812, the parties entitled under the will of John Barker instituted proceedings to redeem the two thirds, as being entitled to the equity of redemption. These proceedings ended in a compromise contained in certain indentures of lease and release between all the parties representing the Barker family, and Samuel Rooth, whereby they agreed to sell, and sold to Samuel Rooth the younger, for the sum of 264*l.* 5*s.*, all the two-thirds in the said estates freed from the proviso for redemption; and then it was thereby covenanted that a fine should be levied of the said two third parts to enure to the use of the said Samuel Rooth, the younger, his heirs and assigns for ever. Elizabeth Rooth, the testator's widow, died on the 16th of February, 1828; and Samuel Rooth the younger, died on the 16th of March, 1829, intestate. Jeremiah Rooth then entered into possession, and paid the two sums of 250*l.* given by the will to his sisters, Mary and Elizabeth, and by his will devised the said estates to the plaintiffs, and died on the 24th of April, 1845. Under the will of Jeremiah, the plaintiffs entered into and remained in, possession. On the 20th of January, 1858, the defendants, Samuel Rooth, Mathew Thomas Hopkinson, and Dorothy Heath, his wife, who are the devisees of Elizabeth and Mary Rooth, claimed to be entitled in remainder to the said property under the will of Samuel Rooth the elder, and commenced an action in ejectment against the plaintiffs, who were the devisees of Jeremiah Rooth, to recover possession of the said premises. The plaintiffs, therefore, filed this bill, alleging (paragraph 29) that, as to two undivided third parts, the testator was in equity entitled only to the monies secured by the indentures of the 12th and 13th of April, 1776, and that under such will, the interest in the said money passed to Samuel Rooth the

younger, as his absolute property; but even if the said equitable right to redeem could not be claimed at the testator's death, or until the indentures of the 28th and 29th of January, 1814, still, by virtue of such indentures, the equity of redemption was revived; and, at all events, that by virtue of the said indenture, the said two-thirds of the said premises became vested in Samuel Rooth the younger, his heirs and assigns, for an equitable estate in fee simple, and were in nowise subject to the limitations contained in the will of Samuel Rooth the elder; but on the death of Samuel Rooth the younger, descended to Jeremiah Rooth, and passed by his will.

The bill prayed that it might be declared that the plaintiffs were entitled to the equitable fee simple of two undivided third parts of the said hereditaments and premises, according to the interests given by the will of Jeremiah, and also prayed for a partition and injunction.

Sir *F. Goldsmid* and Mr. *Hislop Clark* for the plaintiffs.

The plaintiffs claim to be entitled to two-thirds of the estate, and contend, first, that the equity of redemption was never in fact barred; and secondly, even if it had been barred, it was revived by the deed of 1814.

Before the 3 & 4 Wm. 4, c. 27, twenty years possession by the mortgagee was *prima facie* a bar, but that rule proceeded on the presumption of a release, and the rule was therefore held not to apply to the case of a tenant in tail: *Cowne v. Douglas* (a). Still less could it apply where the parties were entitled successively to the equity of redemption, some of them being under disability: *Pim v. Goodwin* (b).

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(a) M'CL. & Y. 321.

(b) 4 Bligh, 133.

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Secondly, the power to revive the right to redeem existed in the tenant in tail under the will of the mortgagee, who also filled the character of executor of the testator. But if the laches of a tenant for life of the equity of redemption was a bar to the remainderman, which it was settled it was, *Harrison v. Hollins* (a), à fortiori a tenant in tail could revive or keep it on foot.

Under the 28th section of the 3 & 4 Wm. 4, c. 27, the acknowledgment of a tenant in tail would revive the right to redeem: *Roddam v. Morley* (b), *Stansfield v. Hobson* (c). In this case the mortgagee was tenant in common with the parties who had the equity of redemption in two thirds.

Mr. Walker, and Mr. Chapman Barber, for the defendants.

First, before the year 1814, the right to redeem was completely barred.

The bar created by twenty years possession by a mortgagee, without account or acknowledgment, is a positive rule of a Court of Equity, adopted by analogy to the Statute of Limitation, 21 Jac. 1, c. 16, as to rights of entry, and which statute it followed, both in the exceptions as well as in the general enactment. The only difference was, that the Court of Equity admitted successive rights, while, under the statute, time began to run against all the world from the entry of the mortgagee. The ground of this distinction was, that the remainderman could not enter until his estate fell into possession, whereas a person entitled to equity of redemption in remainder might redeem during the existence of the life estate, if the tenant for life failed to do so (d).

In *Cowne v. Douglas* (e), the principle was incorrectly

(a) 1 S. & S. 471.

(b) 1 De G. & J. 1.

(c) 3 De G. M. & G. 620.

(d) *White v. Ever*, 2 Vent. 340;

Belch v. Harvey, 3 P. Wms. 288, n.;

Raffety v. King, 1 Keen, 601, and the authorities there received.

(e) M'Cl. & Y. 321.

laid down. In that case, the decision was on a plea, and not at the hearing, and there was no tenancy in tail.

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In this case, Walker was the trustee under the will of the testator, and he was barred in 1797, being twenty years after the death of the testator; but if so, a bar to the trustee was a bar against the *cestui que trust*: *Wych v. The East India Company* (a); but even were the law otherwise, the bar operates against the *cestuis que trust* themselves, for the widow's estate ceased on her marriage in 1784, and the youngest child of the mortgagor attained twenty-one in 1798, and it is not pretended that coverture impeded the right to redeem. It was not necessary that the bar should be complete at the date of the will of the mortgagee: *Noys v. Mordaunt* (b); *Garret v. Evers* (c).

The rule as to tenants in common did not apply, because the mortgagee was entitled to the entirety of the legal estate; and there was no equitable estate, as the mortgagee of the two-thirds had no equitable title, distinct from the legal one vested in him.

Secondly, assuming that in 1814, the bar was complete, was any act done by a competent person, to revive the equity of redemption? Samuel and Jeremiah were both only tenants in tail, and took no steps to acquire a larger estate. But without a disentailing assurance, a tenant in tail, so far as charging the inheritance, is in the same position as a tenant for life, and had no power express or implied to affect the right of those in remainder. The payment or acknowledgment by an executor, of his testator's debt, cannot affect the parties entitled to the real estate, or keep the liability of a joint maker of a note, or the right to marshal assets: *Pittam v. Foster* (d); *Atkins v. Tred-*

(a) 3 P. Wms. 309.
(b) 2 Vern. 583.

(c) Mos. 364.
(d) 1 B. & C. 24.

admitting, for argument's sake, that this is the true view, as to two daughters, the disability did not cease till twenty years after 1795 and 1798, and the deed of 1814 raised a presumption that the right was not then barred. The bar from that time applied to the remedy, and not the right, and the acknowledgment of the right prevented its operation: *Rayner v. Oastler* (a); *Hodle v. Healy* (b).

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It is a mistake to contend that there is no difference between the position of a tenant for life and a tenant in tail. The tenant in tail represents the inheritance, and his neglect to redeem or foreclose binds everyone. *Gregson v. Hindley* was the case of a tenant for life; a tenant in tail is not bound to keep down the interest on a mortgage a tenant for life is: *Chaplin v. Chaplin* (c), *Burges v. Mawboy* (d).

In *Reynoldson v. Perkins* (e), the release of a tenant in tail, in a suit of foreclosure, was held a bar to a bill by a remainderman to redeem.

It could not be argued successfully that Samuel Rooth the younger, became a trustee by the conveyance. In *Brookman v. Hales*, the only case cited in support of the doctrine, there was a mere tenant for life, with power of appointment. The cases cited from *Vernon v. Mosely*, merely show that representatives, as between themselves, are bound by the acts of the original owner.

THE VICE-CHANCELLOR:—

Judgment.
—

The right of the plaintiffs depends mainly on the question whether the admission of the mortgage title by Samuel Rooth the younger, in 1814, binds the persons entitled in remainder under the limitations of his father's will.

It may be assumed that under the will of Samuel Rooth

(a) 6 Mad. 274.

(d) Turner & Russ. 167.

(b) Ibid. 181.

(e) 2 Amb. 563.

(c) 3 P. Wms. 234.

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the elder, who was the original mortgagee in fee, the legal estate conveyed to him as mortgagee was vested in Samuel Rooth the younger, as tenant in tail. Samuel Rooth the younger was also executor, and if the right of redemption had not been lost by length of time, he, as executor, had the right as well as the duty of enforcing payment of the principal and interest of the mortgage money.

Wherever, by an acknowledgment of the mortgage title after twenty years possession by the mortgagee, the right of redemption is restored, the effect is to alter the character of the property as assets of the mortgagee from real estate, which it had acquired after the end of the twenty years, and to restore to it the character of personalty.

It cannot be said that the tenant in tail could not, by his admission of the right to redeem, bind his own interest. The argument is, that he could only bind his own interest, and that his acknowledgment or admission cannot take away the right of those entitled in remainder after his estate tail. But if his admission had any effect at all, it must have restored the original character of the mortgage, and must have given to those entitled to redeem the right of recovering the legal estate on payment to him of the mortgage money in his character of executor. This seems to be the correct view of the effect of the admission of the right to redeem made by Samuel Rooth the younger when in possession of the mortgaged estate as tenant in tail under the will of his father, the original mortgagee. If it be the correct view it follows that the objection that he could not by his admission bind the interests of those in remainder has no force. Therefore, unless the defendant can maintain the proposition that the acknowledgment by the devisee in tail of the mortgagee can have no effect at all in restoring the right to redeem, it seems impossible for them to resist the effect of the acknowledgment and transaction of 1814 by which the tenant in tail took in conveyance to himself in fee of the equity of redemption.

There is no authority and no sound principle for the notion that an acknowledgment by the tenant in tail of the mortgaged estate, does not completely restore the right of redemption. It is well settled that a decree of foreclosure against the tenant in tail in possession binds all in remainder. In *Reynoldson v. Perkins* (a), it was held that a release of the equity of redemption by a tenant in tail in possession bound the remaindermen and reversioner.

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As to the defendant's claiming the benefit of the purchase of the equity of redemption by the tenant in tail in 1814, on the principle that the conveyance to him in fee must enure to him only as tenant in tail, and must be bound by the limitations of the will of his father, there is no sound ground on which it can be supported. The acknowledgment of the mortgage title, if it has any effect at all, must leave the limitations in the will as operating merely on the dry legal estate.

Upon the whole case, the plaintiffs are entitled to a declaration of their title to the equitable fee simple in two-thirds of the estate. The plaintiff and defendant must bear their own costs.

An account was directed of the mesne profits for six years from the filing of the title, making all just allowances.

(a) Amb. 563.

1859.

June 2.

IN THE MATTER OF THE TRUSTEE RELIEF ACT,
AND OF THE TRUSTS OF THE WILL OF JOHN
BOOTH.

The executor of a testator domiciled in Scotland having obtained confirmation of the will in Scotland, on payment of the duty assessed according to the scale adopted in Scotland, is entitled to have the confirmation sealed in England, so as to have the effect of probate under the Act 21 & 22 Vic. c. 50, without any further payment of duty, although, according to the mode of assessing the duty in England, a higher amount would be payable.

JOHN BOOTH, by his will, dated the 13th of April, 1808, gave the whole of his personal estate to persons therein named, upon trust to pay the interest and dividends to Helen Booth, for her life, or *durante viduitate*, and after her death or marriage, to pay sundry legacies, and after payment thereof, to divide the clear residue into eight equal parts, and of the one eighth part to pay the same to John, Robert, and William Booth, children of the testator's paternal uncle, Robert Booth, late of Aberdeen, to be equally divided between them.

The testator died in 1810, and his will was duly proved.

On the 9th of December, 1851, the surviving trustee paid the sum of 1141*l.* 14*s.* 6*d.* cash, and transferred 712*l.* 9*s.* 10*d.* stock, into court, and on the 14th of February, 1852, the dividends were ordered to be paid to Helen Booth.

Helen Booth died on the 25th of March, 1857.

George Booth died on the 21st of March, 1811, intestate, and administration of his estate was granted on the 10th of June, 1858, out of her Majesty's Court of Probate, to Elizabeth Craigie and Ann Steel (two of the petitioners), "the estate and effects being sworn at the time of applying for letters of administration, to be under the value of 300*l.*, and the said letters of administration being stamped with the duty of 8*l.*"^(a)

(a) The words in inverted commas were additions made by the solicitor of Inland Revenue, on behalf of the Crown.

William Booth died on the 29th of May, 1838, domiciled in Scotland, and by his will he appointed John and William Booth his executors (both petitioners), and confirmation was granted to them in the Commissary Court of Aberdeen on the 20th of December, 1858. "The estate and effects of the said William Booth, in England, included in the inventory exhibited in the said Commissary Court as required by law, being stated to be of the value of 20*l.* 0*s.* 7*d.*, and the said inventory being stamped with the duty of 10*s.*" And on the 8th day of February, 1859, such confirmation was sealed with the seal of the principal registry of her Majesty's Court of Probate in England, pursuant to the statute, 21 & 22 Vic. c. 56.

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The petitioners asked for payment of the shares.

Mr. *Dickinson* appeared on the petition.

Argument.

Mr. *Hanson* for the Commissioners of Inland Revenue, contended that the officer of the Scotch Court had made a mistake as to the duty, which in England was chargeable on the value at the time the property fell into possession, which in this case was 300*l.*

The VICE-CHANCELLOR said he had no jurisdiction to decide the question.

But it was stated that the Commissioners, as well as the petitioner, agreed to be bound by his Honour's decision.

Mr. *Dickinson* in reply, cited the 9th and 12th sections of the Act, 21 & 22 Vic. c. 56, (a) and submitted that this

(a) S. 9. From and after the date aforesaid, it shall be competent to include in the inventory of the personal estate and effects of any person who shall have died domiciled in Scotland, any personal estate or effects of the de-

ceased, situated in England, or in Ireland, or both. Provided, that the person applying for confirmation shall satisfy the commissary, and that the commissary shall by his interlocutor find that the deceased died domiciled in Scotland,

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Court must take the decision of the Scotch Court as conclusive. By the law of Scotland, the value of a reversionary interest was estimated at its value at the death of the testator, and not at the death of the tenant for life.

The VICE-CHANCELLOR said :—

The intention of the Legislature in the recent statute was, that the grant of a confirmation (which is the Scotch term for probate) in Scotland should entitle the grantee in England to the same rights as if he had obtained probate in England. If the grant is regularly made in Scotland, there is an absolute right to have it sealed in England without further inquiry. But if this Court was to sit in judgment on the decision of the Scotch Court, the Act would be worse than useless. The probate was therefore sufficient.

The affidavit of Francis James Cockran, of Aberdeen, Scotland, advocate, was tendered as evidence of the law of Scotland.

In paragraph 3 he deposed as follows :—

That according to the law of Scotland, when a confirmation of executors is granted in Scotland to the estate of a deceased person domiciled in Scotland, entitled to an absolute interest in personal property which is not payable or divisible until after the death of

a person having a life interest therein, having been delayed until after such estate has become payable and divisible by reason of the death of such tenant for life, the value of such reversionary interest is estimated at its value at the date of the death of such deceased person, and not at the date of the death of the tenant for life, or the date of the confirmation ; and interest at the rate of 4l. per cent. per annum, is allowed to be deducted from the time of the de-

which interlocutor shall be conclusive evidence of the fact of domicile.

Provided also, that the value of such personal estate and effects situated in England or Ireland respectively, shall be separately stated in such inventory, and such inventory shall be impressed

with a stamp corresponding to the entire value of the estate and effects included therein, where-soever situated within the United Kingdom.

From and after the date aforesaid, when any confirmation of the executor of a person who shall in manner aforesaid, be

ceased's death, to the date when the reversion falls into possession and becomes payable.

4. That if such reversionary interest is invested in the public funds or Government securities of the United Kingdom, it is the invariable practice in such cases in Scotland, to estimate the value of such funds or securities at the selling price on the day of the deceased's death.

5. That the values of the several estates of William Booth, John Outen, Barbara Booth, and David Reid, mentioned in the petition in these matters, were respectively estimated in accordance with the law of Scotland, as aforesaid, and are in my judgment and belief the true value of such estates respectively.

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March 28,
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JOSEPH GARDNER, of Liverpool, formerly ironmonger, and subsequently engaged in speculating in building and buying land, in September, 1856, intermarried with Mary Ann Maddocks, widow, having prior to and

Bill by the assignees of a bankrupt to set aside a settlement of the greater part of the bankrupt's estate, made

previously to and in consideration of marriage, when the bankrupt was embarrassed and insolvent, and the lady aware of his embarrassments,—dismissed with costs; it appearing that the marriage had been honestly contracted, after an engagement for several years.

The principle of the decision in *Campion v. Cotton*, 17 Ves. 263, examined and followed. The reason why the consideration of marriage is so much regarded, as supporting a settlement against the claims of creditors. But where a marriage is dishonestly contracted, as a mere scheme to defraud creditors, as in *Colombine v. Penhall*, 1 Sm. & G. 228, the settlement will be set aside.

found to have died domiciled in Scotland, which includes, besides the personal estate situated in Scotland, also personal estate situated in England, shall be produced in the principal Court of Probate in England, and a copy thereof deposited with the registrar, together with a certified copy of the interlocutor of the commissary finding that such de-

ceased person died domiciled in Scotland, such confirmation shall be sealed with the seal of the said Court, and returned to the person producing the same, and shall thereafter have the like force and effect in England, as if a probate or letters of administration, as the case may be, had been granted by the said Court of Probate.

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in contemplation of such marriage executed two indentures of settlement, bearing date the 15th of September, 1856, which were shortly as follows:—

The first was between the defendant Mary Ann Maddocks, widow, of the first part, Joseph Gardner of the second part, and Richard Tinswood Thompson and Thomas Lawrence, of the third part, whereby, after reciting that the said Mary Ann Maddocks was seised in fee of the hereditaments comprised in the first schedule, subject to certain mortgages therein mentioned, and that the said Joseph Gardner was seised in fee of the several hereditaments comprised in the second schedule, subject to the mortgages mentioned, but free from all other incumbrances; and that the said Joseph Gardner was possessed of the leasehold premises comprised in the third schedule, for the several terms of years, and subject to the rents, covenants, and conditions in the said leases contained, and subject to the mortgages affecting the same, in the third schedule mentioned; and reciting that Joseph Gardner had lately entered into a written contract for certain building land, parts of which had been sold to divers persons, who had erected houses thereon, and had had the land conveyed to them, and other parts of the said land were partly built and partly unbuilt; and that Gardner had advanced to the purchasers of the said pieces of land large sums of money; and that the said Mary Ann Maddocks had advanced to the order or for the use of the said Joseph Gardner, several sums of money, amounting, inclusive of interest, according to an account that day stated, to the sum of 1000*l.*, part of which was secured by the joint and several promissory notes of Mr. John Layfield, and the said Joseph Gardner, dated Liverpool, the 26th day of February, 1856, whereby the sum of 200*l.* was made payable on demand, with interest after the rate of 10*l.* per centum per annum, to the said Mary Ann Maddocks, or her order, for value received, and the

remainder of the said sum of 1000*l.* was in like manner secured by the joint and several promissory note of the said John Layfield and Joseph Gardner, dated the first day of September, 1856, whereby the sum of 800*l.*, with interest thereon at the rate of * per centum per annum, is made payable on demand to the said Mary Ann Gardner; and reciting that a marriage was intended between the said Mary Ann Gardner, then Mary Ann Maddocks, and Joseph Gardner, and that in the treaty for such marriage it was agreed that the said freehold and leasehold hereditaments and premises should be vested in the said Richard Tinniswood Thompson and Thomas Lawrence, on the trusts thereafter contained; and that the said two promissory notes had been indorsed over by the said Mary Ann Gardner, then Mary Ann Maddocks, in favour of the said Richard Tinniswood Thompson and Thomas Lawrence: it was witnessed that, in part performance of the said agreement, and in consideration of the said intended marriage, she, the said Mary Ann Gardner, then Mary Ann Maddocks, as to and concerning only her estate and interest in the hereditaments described in the first schedule thereto, but by and with the privity and approbation of the said Joseph Gardner, did grant and convey, and the said Joseph Gardner, as to and concerning only his estate and interest in the hereditaments described in the second schedule thereto, did, by and with the privity and approbation of the said Mary Ann Gardner, then Mary Ann Maddocks, grant and convey unto the said Richard Tinniswood Thompson and Thomas Lawrence, and their heirs, all and every the pieces or parcels of land or ground, hereditaments and premises thereto respectively belonging, comprised in the first and second schedules thereto, with their appurtenances, to hold the same (subject nevertheless to such mortgage securities

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* Sic in original.

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as affected the same respectively, and had priority over those presents) unto and to the use of the said Richard Tinniswood Thompson and Thomas Lawrence, their heirs and assigns, upon and for the several trusts, intents and purposes thereafter declared thereof. And it was by the said indenture also witnessed, that in further performance of the said recited agreement, and in consideration of the said intended marriage, he the said Joseph Gardner did, by and with the like privity and approbation of the said Mary Ann Gardner, then Mary Ann Maddocks, assign unto the said Richard Tinniswood Thompson and Thomas Lawrence, their executors, administrators and assigns, first, all and singular the pieces of land, messuages, and all other the premises comprised in the third schedule thereto. And secondly, all such estates, title, property, and beneficial interest which he the said Joseph Gardner then had or could have in, to, or out of the pieces of building land under contract for purchase by him as thereinbefore mentioned, or of and in so much and such parts thereof as then remained unsold and unconveyed by the said Joseph Gardner, with their appurtenances. To hold the leasehold premises thereby firstly assigned (subject nevertheless to such mortgage securities as affected the same respectively, and had priority over those presents) unto the said Richard Tinniswood Thompson and Thomas Lawrence, their executors, administrators and assigns, thenceforth and during all the respective residues of the several terms of years for which the same premises were held by the said Joseph Gardner; nevertheless at the yearly rents reserved by the several indentures of lease of the same premises respectively mentioned or referred to in the said third schedule, and to the observance and performance of the covenants, conditions, and agreements, on the lessees' or assigns' part to be paid, observed and performed; and to hold the said pieces of building land, and all rents, benefit and profits thereof, or to be derived therefrom, subject to any lien or

claim of the said Samuel Martin and Ann Houldsworth therein or thereto, unto the said Richard Tinniswood Thompson and Thomas Lawrence, their executors, administrators, and assigns, in as full, ample, and beneficial a manner to all intents and purposes as he the said Joseph Gardner then held the same, but nevertheless, the whole of the premises thereby firstly and secondly assigned to be held upon and for the several trusts, intents, and purposes therein declared thereof; and it was by the indenture now in statement declared and agreed, that the said Richard Tinniswood Thompson and Thomas Lawrence, their heirs, executors, administrators, and assigns, should stand seised or possessed of the whole of the said freehold and leasehold hereditaments and premises, and all the beneficial estate and interest of the said Joseph Gardner in the said pieces of building land thereby respectively granted, conveyed and assigned, upon trust, at the direction of the said Mary Ann Gardner and Joseph Gardner, and the survivor of them, and, after the decease of the survivor, at their own discretion, to sell the same by public auction or private contract, with full powers to contract for the sale of or to buy in the same; and as to the hereditaments and premises respectively comprised in the second and third schedules thereto, to effect any sale subject to or discharged from the mortgages affecting the same respectively; and it was declared that the trustees or trustee for the time being should stand possessed of the sums of money to arise in pursuance of the aforesaid trusts for sale, and also of the said principal sums of 200*l.* and 800*l.* secured by the said promissory notes and interests thereon, and the rents and profits of the said hereditaments and premises until sold, after payment of taxes and other outgoings, upon and for the trusts, intents, and purposes declared concerning the same in and by an indenture of even date therewith, and then already prepared and engrossed, being the indenture next hereinafter stated; and it was declared that the receipts of the trustees or trustee

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should be a sufficient discharge to any purchasers of the said hereditaments and premises, and that the said trustees or trustee might, until sale thereof, lease any part of the said hereditaments and premises for any term of years at rack rent. And it was by the indenture now in statement provided, that in case the freehold and leasehold hereditaments and premises, or the beneficial estate and interest of the said Joseph Gardner of and in the said pieces of building land, or any parts thereof respectively, should be sold under the powers in that behalf contained in any of the indentures of mortgage affecting the same respectively, or in the written contract for the purchase of the piece of building land, then any sum or sums of money to arise from such sale and remaining after satisfaction of the principal and interest due in respect of such mortgage or written contract respectively, should be received by the said trustees or trustee, and be held by them upon the same trusts as were thereinbefore declared concerning the monies to arise from sales made in pursuance of the trusts aforesaid. And in the said indenture is contained a power for the appointment of new trustees, a trustees' indemnity clause, a power for the said trustees or trustee to appoint receivers, or other agents, for the collection of the rents of the said hereditaments and premises, and a proviso that it should be lawful for the said Richard Tinniswood Thompson, or any other trustee of the legal profession, to make the usual charges for advice given, and business professionally done by him in the execution of the trusts aforesaid. And the said Mary Ann Gardner, then Mary Ann Maddocks, for herself, her heirs, executors, and administrators, and the said Joseph Gardner for himself, his heirs, executors, and administrators, did thereby covenant with the said Richard Tinniswood Thompson and Thomas Lawrence, for the further assurance of the aforesaid trust estates, monies, and premises.

The second indenture was of the same date, and between

the same parties, and recited the intended marriage, and reciting the indenture of even date, it was in consideration of the said intended marriage agreed that the said trustees, &c., should stand possessed of the monies to arise from the sales under the first indenture, and of the two principal sums of 200*l.* and 800*l.* secured by the two promissory notes, and of the rents and profits of the hereditaments and premises severally conveyed and assigned as aforesaid, and of the sums of money (if any) received by virtue of the same indenture after deducting the costs incurred in the execution of the trusts thereof, upon trust to invest the same upon such securities as are therein mentioned, and to vary such investments and to stand possessed of the same, and the interest, dividends and annual produce thereof, during the joint lives of the said Mary Ann Gardner, then Mary Ann Maddocks, and Joseph Gardner, upon trust for the said Mary Ann Gardner for her sole and separate use, but not so as to deprive herself of the benefit thereof by anticipation; and after the decease of the said Joseph Gardner, in case the said Mary Ann Gardner should survive him, upon trust for the said Mary Ann Gardner during her life, and after the decease of the said Mary Ann Gardner, in case the said Joseph Gardner should survive her, upon trust for the said Joseph Gardner during his life, until he should be declared a bankrupt, or take the benefit of any Act or Acts of Parliament passed for the relief of Insolvent Debtors, or should make any assignment for the benefit of his creditors, or do or commit any act whereby, either by operation of law or otherwise, his interest in the periodical interest, dividends and annual produce would be, but for that clause, vested in some other person or persons. And after the decease of the said Joseph Gardner, subject to the restrictions aforesaid, or if the said Joseph Gardner should mortgage, charge, or otherwise affect his interest in the said dividends and annual produce by way of anticipation, and the said Mary Ann Gardner should

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happen to be dead, then upon trust as well for Joseph Greenwood Gardner and Thomas Postlethwaite Gardner (the two sons of the said Joseph Gardner) as for all and every the children and child of the said Mary Ann Gardner, then Mary Ann Maddocks, by the said Joseph Gardner, who being a son or sons should attain the age of twenty-one years, or die under that age, leaving issue; or, being a daughter or daughters, should attain the age of twenty-one years, or marry, in equal shares and proportions as tenants in common; and in case there should not be any such child or children of the said Mary Ann Gardner by the said Joseph Gardner, then the said trust-monies and the annual produce thereof should be held by the said trustees or trustee upon trust, as to so much thereof as should arise from the sale and conversion of the freehold hereditaments constituting the settled property of the said Mary Ann Gardner, then Mary Ann Maddocks, and comprised in the first schedule to the indenture herein-before stated, and also as to the said several sums of 200*l.* and 800*l.* for such person or persons as the said Mary Ann Gardner should, notwithstanding coverture, in manner therein mentioned appoint, and in default of such appointment for the next of kin of the said Mary Ann Gardner, as if she had died without leaving a husband and intestate. And as to and concerning the residue of the said trust monies, upon trust for such person or persons as the said Joseph Gardner should in manner therein mentioned appoint, and in default thereof for the next of kin of the said Joseph Gardner. And in the indenture now in statement are contained powers for the maintenance, education and advancement of the children or other issue of the said Mary Ann Gardner, then Mary Ann Maddocks, by the said Joseph Gardner, and powers for the trustees or trustee to sell and convert all or any part of the said trust monies, and to invest the same in the purchase of freehold, copyhold, or leasehold estates, and to sell or mortgage the said estates, and to apply the

rents thereof until sold in the same manner as the interest of the money to be laid out or invested in such purchases would have been applicable if the same had not been made. And it was by the said indenture provided, that if the whole or any part of the hereditaments respectively comprised in the first, second, or third schedules of the indenture hereinbefore stated should be sold by the mortgagees thereof, and there should be any surplus payable to the said trustees or trustee, such surplus should be applied in the reduction of the said mortgage debts in the said schedules respectively mentioned or referred to. And it was also declared that until the freehold and leasehold hereditaments and premises by the said indenture hereinbefore stated, conveyed and assigned, should be sold, the trustees or trustee should pay and apply the rents and profits of the said hereditaments and premises, after payment thereof of the taxes and other outgoings, unto the person or persons to whom the annual produce of the monies to arise from the sale of the said hereditaments and premises would, under the trusts aforesaid, be payable and applicable in case such sale had been made. And in the indenture now in statement are contained a power for the appointment of new trustees, and trustees' receipts, indemnity clauses; and a proviso that it should be lawful for the said Richard Tinniswood Thompson, or any other trustee of the legal profession, notwithstanding his being a trustee thereof, to make the usual charges for advice given and business professionally done in the character of an attorney or solicitor in execution of the trusts of that indenture.

It appeared from the evidence of John Layfield, who had been associated with Joseph Gardner, and whose pecuniary embarrassments were a main cause of Gardner's difficulties, that in 1856, prior to the marriage, numerous actions were brought against Gardner and the witness.

In the 13th paragraph of his affidavit he deposed as follows:—

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"That Mary Ann Gardner was fully acquainted with the position of the affairs of the said Joseph Gardner, and I know this from my having had frequent conversation with her respecting his affairs, and from my having been present at, and heard conversations between her and the said defendant."

Richard Midgely deposed :—"That in July or August, 1856, Joseph left his own residence in Falkener Street. Liverpool, and stayed several days at the public house of John Layfield.

"That he used to go out by seven o'clock in the morning, and return at night at eleven and twelve o'clock, and later; and during the day, while he was out, a great number of people used to call to look for him, and several writs were left at the said house for him, and other persons used to call with writs for him which were not left; and after it became known where he was staying, he went to live elsewhere."

Thomas Birket deposed :—"That on one occasion Mary Ann Maddocks requested me (witness) to see whether there were any bailiffs looking for Gardner about the house, and I made an arrangement to inform her in case any such persons were about."

Thomas Lowe, an accountant, deposed :—"That he had examined Gardner's books and accounts, and that when he was married he owed various persons 3163*l.* 11*s.* 6*d.* of unsecured accounts, and other persons 30,217*l.* 1*s.* 4*d.* on mortgage.

"That the whole of his property was then in mortgage, and the greater part to the full value, and the remainder was included in his marriage settlement except as to one sum of 200*l.*"

There was besides a mass of evidence to show the husband's pecuniary embarrassments, and the wife's acquaintance with his circumstances.

Thomas Lawrence, the clerk who prepared the settle-

ment for Mr. Thompson, and being in contempt for not putting in his answer, was subsequently allowed to make an affidavit on behalf of the plaintiffs, deposed, that he prepared the deeds on the instruction of the intended husband and wife; that the drafts were finally settled at Mr. Thompson's office in Preston, were sent to be engrossed at Manchester, from whence they were by the intended husband and his wife, by means of a letter from Thompson, procured from the law stationer, on their way to London, and were executed on the 15th September at the house of Messrs. Lauford, Mr. Thompson's agents in Friday Street, Cheapside, in the presence of these gentlemen.

It appeared that the furniture of the wife was removed, without any attempt at concealment, to the house where the husband and wife went to reside.

On the 4th August, 1857, Gardner was adjudicated a bankrupt.

It appeared from the evidence that Mr. Gardner and Mary Ann Maddocks had been for several years engaged to be married, but had been prevented by the pendency of a Chancery suit against her by the legatees under her former husband's will. The husband in his examination in bankruptcy, swore, that prior to his marriage, Mrs. Maddocks had advanced him about 1500*l.* on the security of promissory notes of himself and Layfield, and on a second mortgage of a house in York Street for 200*l.*, and which was in part applied in payment of his creditors. He admitted that at the date of his marriage there were a dozen judgments against him, and that his wife was aware of his difficulties.

The assignees in bankruptcy then filed this bill, praying "that the two indentures of the 15th of September, 1856, might be declared to be fraudulent and void, and that the same might be set aside, so far as they related to the property specified in the second and third schedules to the said first indenture."

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Argument.

Mr. Bacon, and Mr. Kekewich, for the assignees.

It is proved beyond question, that the husband at the date of, and before, the settlement and marriage, was in a state of pecuniary embarrassment, and hiding from his creditors. And it was also proved that the wife was aware of his circumstances. The presumption, therefore, was, that this settlement was an attempt to defraud creditors, but further, when the settlement was examined, it would appear that the whole of the husband's property, except, perhaps, a sum of 200*l.*, was withdrawn from his creditors.

This settlement differed little, if at all, from *Colombine v. Penhall* (a), and must, therefore, be set aside.

Mr. Craig, and Mr. J. H. Taylor, for the bankrupt and his wife.

The case of the plaintiffs is, that the settlement was a fraudulent contrivance to defraud the creditors, because, unless that be shown, the bill must fail.

It appeared from the evidence that the parties were under an engagement to be married, for some time before the marriage took place; it appeared also that the husband was indebted to the wife to a considerable amount, for monies she had actually advanced. This, of itself, would be sufficient to rebut the suspicion of contrivance, even could the Court act on suspicion, which it could not.

There was not only not any case to authorize what was asked by the prayer of this bill, but the authorities were all the other way.

Colombine v. Penhall, which was relied on, was in fact no authority at all. That was a case of gross fraud, but even there it was not so much on the fraud that the decision turned, as on the fact of the settlement, amounting to such a parting with property, as itself to constitute an act of bankruptcy, within the 67th section of the Bankrupt Act, under which no one could derive any title (b). It is

(a) 1 Sm. & G. 228.

(b) Ibid. 257.

difficult to conceive more fraudulent conduct than that of the husband in *Campion v. Cotton* (a), yet, there Sir William Grant sustained the settlement. The true criterion was not whether the settlement withdrew property from the creditors, but whether the marriage was honest and *bonâ fide*, because, if it was, the settlement could not be impeached, inasmuch as it was impossible to remit the parties to their original position.

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That the consideration was sufficient, could not be disputed, and must be performed in entirety: *Ford v. Stuart* (b); *Heap v. Tonge* (c).

Again, what was asked here, was to set aside the deed in part, but that could not be done.

Bannatynes v. Leader (d) and *Pulvertoft v. Pulvertoft* (e), were also cited.

Mr. *Malins*, for the infant child of Mrs. Maddocks by a former husband, contended it was impossible to impeach the infant's interest in the property of the wife.

Mr. *Little* appeared for the trustee, Thompson

Mr. *Bacon*, in reply, relied on *Colombine v. Penhall*. A good consideration was not enough; the transaction must be *bonâ fide*. It was quite clear that the deed might, in a proper case, be set aside, as to part: *Lester v. Garland* (f).

The VICE-CHANCELLOR:—

This is a suit by the assignees of a bankrupt, to set aside the indentures of settlement of the 15th of September, 1856, on the ground of fraud against the creditors of the bankrupt. So far as the settlement includes property of the bankrupt himself, unless it can be supported by the consideration of marriage, the evidence of the embarrassed state of his affairs is so strong that it could not stand.

May 28.
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(a) 17 Ves. 263.

(b) 15 Beav. 493.

(c) 9 Hare, 90.

(d) 10 Sim. 350.

(e) 18 Ves. 84.

(f) 5 Sim. 205.

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But it is the policy of the law to give paramount force to the consideration of marriage. Unless the marriage itself be a mere fraudulent contrivance for defeating creditors, the doctrine both at law and in equity has been to support a settlement of the husband's property, when it appears to have been made previously to and in consideration of an honest marriage, and this, notwithstanding the embarrassed circumstances of the husband at the date of the settlement; and even where the wife has contracted the marriage and obtained the settlement with a full knowledge of the husband's embarrassments.

In the present case, there is evidence to prove that the wife was fully cognizant of the pecuniary difficulties of the husband, and had even concealed him in her house to avoid his creditors.

But it was held in the case of *Campion v. Cotton* (a), that where the settlement was made previously to and in consideration of marriage, the embarrassed circumstances of the husband, and the fact that the wife knew that he was embarrassed are not enough to invalidate the settlement.

It is said, indeed, in the present case, that it is only as to the trusts declared of the husband's property that it is sought to set aside the settlement, and that it may stand so far as relates to the property of the wife. But this view presents various difficulties. The settlement of the husband's property is part of the consideration for the settlement of the wife's. If the husband's property is to be restored to his creditors, it is impossible to restore to the wife that state of enjoyment of her property which she had before the marriage. By the settlement of her property and by the marriage, she parted with the absolute dominion of her own property and person on the faith of the settlement of the husband's property.

(a) 17 Ves. 262.

These difficulties as to restitution, when duly examined, illustrate the principle on which settlements made in consideration of marriage are supported against creditors, where a pecuniary consideration, however adequate in point of value, would be insufficient. But the difficulty extends beyond the effect of the settlement on the wife's property included in it. All the unsettled personal property of the wife which may accrue to her during the marriage, becomes by the marriage the property of the husband and his creditors. If the husband's settled property should be decreed to be restored to his creditors, there can be no restitution to the wife of her unsettled property, and she must lose it, as well as those rights under the settlement in consideration of which she parted with her own. There are, no doubt, some cases in which courts of equity will set aside a settlement as to part of the property comprised in it. *Lester v. Garland (a)*, is a case of that kind. But where there are reciprocal settlements, and the consideration of marriage occurs, it is necessary to observe all the circumstances. Two things are involved. There is the marriage itself, as it affects the personal rights and duties and disabilities. There is also the settlement as it affects the property of both parties. Where a settlement or conveyance, not made in consideration of marriage, but perhaps made on a valuable pecuniary consideration, is set aside as fraudulent against creditors, there is no difficulty in effecting restitution. The property is restored and the money repaid. Both parties are by decree of the Court remitted to their previous position, and the settlement or conveyance set aside.

But when marriage is the consideration, restitution is impossible. Therefore it is that in the case of *Campion v. Cotton (b)*, notwithstanding the strong circumstances showing fraud against the creditors, the paramount value of the consideration of marriage supported the settlement.

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(a) 5 Sim. 205.

(b) 17 Ves. 268.

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—
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The circumstances of that case were very remarkable, for the settlement was made in order to withdraw the property from the creditors, and secure a provision for the intended husband and wife at the expense of his creditors. He was greatly embarrassed, and the wife well knew his pecuniary difficulties. There was a false recital in the settlement that the stock settled had been purchased with her money. He had transferred into the name of his wife sums of stock not his own property, but the property of persons for whom he had acted as broker. Notwithstanding all these circumstances, because the marriage was legally contracted the Court refused to set the settlement aside. The ground of the decision was the paramount force and value of the consideration of marriage, and the impossibility of restitution from the nature of the marriage contract.

In *Colombine v. Penhall* (a), the settlement was set aside on the ground that the marriage was not contracted *bond fide*, but was a mere contrivance to remove from the reach of creditors the property enjoyed during an illicit cohabitation which had subsisted for years. The marriage was a mere fraudulent device, resorted to for the purpose of the settlement, and for the purpose, not of giving, but of retaining the means of comfortable cohabitation in fraud of the creditors.

In the present case there seems no reason to doubt that the marriage was honest. The evidence shows that for several years these persons had been engaged to be married to each other, and that the reason for postponing the marriage was the existence of a Chancery suit. It is clearly proved that before the marriage the wife had at various times advanced sums of money, altogether to a large amount, to assist and relieve the intended husband. The nature of his occupation made the value of his property and his pecuniary affairs liable to great fluctuation. But the fact that at the

(a) 1 Sm. & G. 228.

time of the marriage he was indebted to her for money advanced at various times, to a sum exceeding 1000*l.*, very much supports the *bona fides* of the case.

Where the marriage is honestly contracted, the interests of society require that a high regard be paid to all contracts and settlements of property made on a consideration so important. The indissoluble nature of the marriage contract itself, and the alteration which it effects in the personal condition, require a careful attention. So does also the nature of the rights and duties and disabilities which arise from it. These consequences are reasons why the consideration of marriage has an importance and value above that of all pecuniary considerations; and unless the Court finds that the sacred nature of that consideration has been profaned, and finds that the ceremony of marriage has been resorted to as a mere pretence and cloak for a fraud, and finds clear evidence that it is a fraudulent marriage, there is no case in which any settlement of property made previously to and in consideration of marriage has been set aside on the ground of the insolvency or embarrassed circumstances of the husband, or as fraudulent against his creditors on a subsequent bankruptcy. Where the marriage is honest the question must be, not whether the settlement is a fraud on the creditors, but whether it can be set aside without defrauding the wife. But, where, as in *Colombine v. Penhall*, the marriage is dishonest, and the primary purpose of it was not to obtain the *status* of marriage on an honourable contract, but to secure the continuance of cohabitation by the settlement of property, the ground on which the high value of marriage is rested seems entirely to fail.

As to the arguments raised by the plaintiffs on the Bankrupt Act, their force is not great.

The 126th section of the Act, by its exception, saves the settlement by a bankrupt being at the time insolvent made on marriage of a child. It never has been held that a

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settlement made in consideration of a *bond fide* marriage is within the operation of the 133d section. To say that the settlement in this case is itself an act of bankruptcy, or that the wife contracted the marriage with notice of a previous act of bankruptcy, in the absence of any express words in the statute, would be to violate the principle on which the consideration of marriage has so high a value. There is no authority and no sound principle on which it can be held that a settlement in consideration of an honest marriage is within the scope of any of the provisions in favour of creditors contained in the Bankrupt Act.

Two of the principal witnesses on behalf of the plaintiffs (*viz.*, Layfield, whose insolvency seems to have been one main cause of the husband's bankruptcy, and Lawrence, one of the trustees of the settlement) do not by their evidence create a favourable impression of the plaintiffs' case where their statements are contrasted with the unquestionable parts of the evidence of the husband and wife.

As to that part of the plaintiffs' case which relates to the preparation of the settlement at Preston, the engrossment of it at Manchester, and the journey to London on the Sunday previous to the marriage, they seem to be of little or no importance as evidence of fraud. And on the question of concealment, it seems an uncontradicted fact that the household goods and furniture of the wife were removed from her house to the house in which they went to reside on their marriage, by Layfield himself, in the open day, through the streets of Liverpool. The marriage having been contracted *bond fide* on a long previous engagement, and not for any fraudulent purpose, the bill must be dismissed with costs.

The question as to the validity of the limitation over to take effect on the bankruptcy or insolvency of the husband, has not been raised or argued in this suit, and is not affected by this decree. It must be understood that I say nothing to countenance the notion that it is valid

1859.

LINLEY v. TAYLOR.

June 6, 7.

MATHEW TURNER, of Beverley, by his will, dated the 6th October, 1853, having directed all his just debts, personal and testamentary expenses, to be paid by his executors out of such part of his estate as could not by law be bequeathed for charitable purposes, gave and devised as follows:—

“I devise and bequeath all my lands, tenements, and real estate, whatsoever and wheresoever, and all such parts of my personal estate as I am not allowed by law to bequeath for charitable purposes, excepting only estates vested in me as trustee or mortgagee, unto Richard Taylor, Thomas Linley, and William Atkinson, upon trust to sell my real estate, and so much of my said residuary personal estate as shall be of a saleable nature, and to get in the rest of my residuary personal estate, and to dispose of the net monies to arise from such real estate and residuary personal estate, according to the trusts hereinafter declared concerning the same, but with a discretionary authority to postpone for such period as to them shall seem expedient the sale of any part of my real estate, and the getting in of any part of my residuary personal estate hereinafter bequeathed; and also to let, farm, and manage the unsold real or leasehold estates. And I direct that my said trustees shall stand possessed of the principal sum to arise from the sale of my real estate, and the rents of the unsold portion thereof until sold, and the conversion of my residuary personal estate of the description aforesaid, and which said principal sum is hereinafter denominated my

Bequest of shares in a railway company leased to another company for 1000 years with power to purchase—*Held*, not within the Mortmain Act.

Gift by a testator of an annuity to his widow, followed by a devise to trustees to sell and lease the land until sold—*Held*, that the widow must elect.

A testator having converted his personal estate into two funds, on one of which (his general fund) he charged his funeral and testamentary expenses—

Held, the costs of a general administration suit were payable out of the whole personal estate.

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general fund, upon trust, in the first place, to keep the same separate and apart from the principal monies herein-after mentioned, and called my charity fund; and in the next place, to pay and apply my general fund in liquidation of my just debts, and all the legacies hereinafter bequeathed, and in such other manner as is herein directed."

The testator then gave an annuity of 100*l.* a year to his wife, and a like sum to his sister, and directed his trustees to invest a competent sum in real or government security to answer such annuities, and directed that on the death of the annuitants, the capital should sink into his general fund. He then gave other legacies, and directed "that if his general fund should be insufficient after payment of his debts, funeral and testamentary expenses, to pay all the annuities and pecuniary legacies chargeable thereon in full, they should all abate proportionately according to the amount thereof, but no part whatever of his charity fund should be appropriated towards payment of them; and he directed that if his general fund should be more than sufficient for payment of such annuities and pecuniary legacies, the surplus should be divided among the legatees proportionately."

The testator then proceeded thus: "I bequeath all my printed books, household furniture, and all such my monies and securities for money, and other parts of my personal estate and effects whatsoever and wheresoever, not herein-before bequeathed, as may lawfully be bequeathed by me for charitable purposes, unto the trustees of my will, upon trust to keep the same separate and distinct from the proceeds of the sale of my real estate, and such parts of my personal estate as cannot be lawfully applied to charitable purposes, upon trust to sell, &c., and on further trust to invest the monies so to arise in the names of the said Richard Taylor, Thomas Linley, and William Antony Atkinson, jointly with the name of the Rev. Norfolk Jackson of Filey, in the public stocks, or on mortgage of freehold or copyhold estates in England or Wales." The testator then

called this his charity fund, and the trustees, the charity trustees; and proceeded to give directions for establishing in Beverley a charity for the benefit of domestic female servants.

After the testator's death, a suit was instituted for the administration of his estate. By the certificate, the chief clerk found that there was a balance of 504*l.* 9*s.* 4*d.* of personal estate. He certified that two sums of 152*l.* 13*s.* 9*d.* and 327*l.* 17*s.* 9*d.* residue were not bequeathable for charitable purposes, having arisen from dividends from shares in the Hull and Selby Railway Company, declared out of the rents received by that company from the North-Eastern Railway Company, under a lease dated the 12th day of May, 1855, for 1000 years, at a fixed rent of 70,000*l.* a year. The certificate also found, that by a contract dated the 30th day of June, 1845, the North-Eastern Railway Company, on certain conditions, was to have the option of purchasing the Hull and Selby Railway.

The chief clerk also certified that the widow was entitled to dower.

Three questions were raised. First, whether the existence of a lease of the Hull and Selby Railway to the North-Eastern Railway Company, brought the shares within the operation of the Mortmain Acts. Secondly, whether the widow was entitled to dower. Thirdly, whether the direction for payment of debts, funeral and testamentary expenses, relieved the charity fund from contributing to the costs of the suit.

Mr. *Greene* and Mr. *Smythe* contended for those interested in the general fund as against the charity.

That shares in a railway company, which is conducted in the ordinary way, are personalty and not within the Mortmain Act, is settled by authority (a). The principle on

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Argument.

(a) *Myers v. Perigal*, 2 De G. M. & G. 599; *Edwards v. Hall*, 6 De G. M. & G. 74.

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 —
Argument.

which the Court has come to that conclusion is, that the shares constitute the right to receive a portion of the profits derived from carrying on a trade, and that their value is dependent on the amount of such profits; and this view is strongly supported by *Myers v. Perigal*. But the Hull and Selby Railway Company, by virtue of the agreement of the 30th of June, is no longer a trading company, but is in the position of a landlord entitled to receive and demand, not a share of profits, but an annual rental, of 70,000*l.*, from the lessee, and the principle of the decision in *Myers v. Perigal* and the other cases, fails altogether. It may be said that the company may resume business again, and become a trading company; but the chief clerk has found that they have not only leased their line, but have given the lessees the option of purchasing it within five years which commenced before the testator's death. Should the lessees claim this right to purchase, the company is destroyed as a trading company, for by section 5 of the Act, the completion of the purchase repeals the previous Acts relating to the company, and the shareholders will become *cestuis que trust* entitled to an aliquot part of the price of the property.

On the whole, therefore, it is submitted that by virtue of the lease, at a fixed rent, the shares in the rent are realty within the Mortmain Act.

S. 15 is as follows:—"The directors are to stand possessed *upon trust*, after paying or providing for the payment of all the debts, liabilities, and engagements of the Hull and Selby Railway Company, to divide the said purchase and other monies rateably between the several persons who at the time of the pay-

ment of the said purchase-money, or the balance or surplus thereof, as the case may be, shall be proprietors of shares in the capital of the same company, in proportion to the number and amount of their respective shares therein, and their respective executors, administrators and assigns."

Ware v. Cumberlege (a); *Toppin v. Lomas* (b); *Watson v. Spratley* (c); *Hayter v. Tucker* (d), were also cited.

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—
Argument.

Mr. *Bacon* and Mr. *Currey*, and Mr. *Edwards*, for a legatee, on this point, supported the case of the residuary legatee.

Mr. *Malins*, and Mr. *Bury*, appeared for the executors, who supported the gift to the charity.

It is admitted that before the lease, the shares were personal estate, and it cannot be disputed, on the determination of the lease, either by forfeiture, effluxion of time, or surrender, the Hull and Selby Company will be again a trading company, and the shares will become like any ordinary shares. How, then, could the lease alter the quality of the property? If a lease for 1000 years had that effect, a lease for a week must, in law, have the same. Suppose a part of the line only had been leased, would the shares be then real or personal estate?

The true criterion was, whether the shareholders could obtain possession of the land (e), which, it was submitted, they never could.

Mr. *Greene*, in reply.—The reversion might, possibly, be personal estate, and the quality of the property might hereafter be changed, but the question is, what was the character of the shares, at the testator's death. They were, clearly, no more than a right to an aliquot part of a fixed rent of land. All the cases cited, were cases of companies actually trading.

The VICE-CHANCELLOR :—

The principal difficulty arises from its having been held

Judgment.
—

(a) 20 Beav. 503, overruled.

(d) 4 Kay & J. 243.

(b) 16 C. B. 145.

(e) *Myers v. Perigal*, 2 De

(c) 10 Ex. 222, 245.

G. M. & G. 599.

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that shares in a trading company, holding land or other real estate for the purpose of carrying on its business, are not an interest in land within the meaning of the Mortmain Act. That they are an interest in land, in one sense, there can be no doubt, but that where the land is used by a public company, for the purposes of trade, the shares are not an interest in land, within the Mortmain Act, is concluded by authority. I am glad that such a conclusion has been attained, though there is a good deal of difficulty in adopting the reasoning that has led to that state of the law.

But if the shares in a trading company, carrying on its own business, are personal estate, it is difficult to see how the circumstances that one company has demised its land to a second company, who use it as a trading concern, can make any difference. The land is still used, for the purpose of trading, and the only return from the lands, are in the shape of profits out of which the rent is paid. All the arguments are as applicable to the case of the company conducting its own business, as to a company delegating its rights and powers to another.

The certificate, must, therefore, be varied on this point.

Mr. Greene.—Then comes the question, whether the testator's widow is not put to her election. She is clearly dowerable at law, but the testator has devised all his real estate to trustees, upon trust to sell, with discretionary authority to postpone the sale of any part of the estate, and to let from year to year, the unsold real estate; and the testator has given to his widow an annuity out of the general fund, and until the sale, out of the rents. It is not a question of intention, but on the authorities, the widow is put to her election, *Hall v. Hill* (a); *O'Hara v.*

(a) 1 Dr. & W. 94, 107.

Chaine (a); even in a case where the power was only to lease from year to year:—*Grayson v. Deakin* (b); *Parker v. Sowerby* (c); *Bending v. Bending* (d).

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Mr. *Bacon*, on behalf of the widow, contended that the power to sell and lease must be taken as subject to the widow's right to dower.

The VICE-CHANCELLOR:—

I am afraid the widow must elect. The authorities are as clear one way as the principle is the other.

Mr. *Greene*.—The only remaining question is, as to the costs. The general fund ought not to bear the whole costs (e). The testator charges his testamentary expenses on the general fund, but that direction will not include the costs of a general administration suit: *Browne v. Groombridge* (f).

Mr. *Malins*, for the charity, contended that the whole costs ought to be borne by the general fund, on which the testator had charged his funeral and testamentary expenses: *Wilson v. Heaton* (g).

Mr. *Greene*, in reply.—*Wilson v. Heaton* was a creditor's suit against a portion of the testator's estate, specially charged with payment of his debts, and the costs would, of course, be payable out of the same fund as the debts.

The VICE-CHANCELLOR:—

The mere charge, by the testator, of the funeral and tes-

(a) 1 J. & L. 662.

(b) 3 De G. & Sm. 298.

(c) 4 De G. M. & G. 321—324.

(d) 3 K. & J. 257.

(e) *Tempest v. Tempest*, 7 De G. M. & G. 470.

(f) 4 Mad. 495.

(g) 11 Beav. 492.

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 Judgment.

tamentary expenses on a particular fund is not sufficient to justify the Court in throwing the whole costs of a general administration on that fund. The costs must be paid out of the whole personal estate.

June 4th.

Re GROVE'S TRUSTS.

Gift to executors of the testator's money on trust to employ 500*l.* in purchasing a house for M. L. for her sole and separate use, remainder to her children, with a farther direction after buying the house to invest in government securities sufficient money to produce 40*l.* a year, and to pay the same quarterly for her sole and separate use.—
Held, that M. L. was entitled to an annuity for her life only, and not to the corpus of the fund.

C. H. GROVE by his will, dated in 1843, made the following disposition:—

“ I bequeath to J. Grove and F. Hillesden, all my money and securities for money whatsoever, upon trust to employ 400*l.* or 500*l.* in purchasing a house, and to allow Miss Matilda Lloyd to reside therein, and to have the use thereof for her sole and separate use; after her decease the same to go to her children, if any, equally. I further request my trustees aforesaid after buying the house aforesaid, to invest in government securities sufficient money in their names to produce 40*l.* per annum, and to pay the same quarterly to the said Matilda Lloyd for her sole and separate use, free from the debts and engagements of any husband with whom she may intermarry; her receipt alone to be a good discharge for the same, not by way of anticipation.” Subject to this investment the testator gave some other legacies, and gave “ the residue of his property, which would be considerable,” to his father.

The testator died in 1857, and his will was proved by his executors, who invested a sum sufficient to produce 40*l.* a year.

The legatee claimed to have the *corpus* of the annuity paid to herself, and on the trustees declining to comply with her demand this petition was presented.

Mr. *Rogers*, for the legatee, Matilda Lloyd, contended that where an annuity was given to a person absolutely, it was settled that the annuitant was entitled to have the *corpus* of the fund. Here the testator having directed his trustees to purchase a house which was to be for the use of the legatee and for her children after her, clearly indicated an intention to make a permanent provision for the lady and her family; and then followed this gift of an annuity, without any words to restrict the signification of the word. *Heron v. Stokes* (a), and *Kerr v. The Middlesex Hospital* (b), were cited.

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Re GROVE'S
TRUSTS.
Argument.

Mr. *Locock Webb* appeared for the residuary legatee.

The VICE-CHANCELLOR :—

Judgment.

There is nothing in the will to indicate an intention to give the legatee the *corpus* of the fund, or to give more than an annuity for her life. The general rule is, that where an annuity is given by will, the annuitant takes for life only. This was decided in *Yates v. Maddan* (c). There must be a declaration to that effect, and that the annuitant is entitled to have a sufficient fund appropriated to answer the annuity.

(a) 2 Dr. & W. 89.

(b) 2 De G. M. & G. 576.

(c) 3 M. & G. 532.

1857.

COCKS v. GRAY.

July 7th.

THOMAS GRAY was mortgagee in possession of a lease of a public-house and stables, called the Running Horse Livery Stable, Piccadilly, and let the stables to Charles Mason, as tenant from year to year, at the rent of 360*l.* per annum. In 1843, there being then two and a half years' rent in arrear, the defendant Gray gave the following direction to the broker:—

A mortgagee in possession held not to be chargeable as for wilful default, in declining to defend an action of replevin brought by the owner, of property, which was on the premises and seized under a distress for rent levied by the mortgagee

“MR. SCOTT.

“I hereby authorize you to distrain upon the premises within mentioned any goods and chattels you may find there, whether the same be horses and carriages standing at livery or otherwise, and for so doing this shall be your indemnity.

“Dated this 14th August, 1843,

(Signed) “THOS. GRAY.

	£	s.	d.	£	s.	d.
“2½ years' rent to Mid-						
“summer				900	0	0
“1841, Aug. 2, Cash . . .	50	0	0			
“ ” Villiers . .	109	11	6			
“Feb., 1843, Cash	13	8	7			
				173	0	1
				£726	19	11

“Say £725.”

The broker, in pursuance of the above notice, entered upon the premises and took possession of several carriages and horses, belonging to different noblemen and gentlemen,

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which were then standing at livery on the premises. The defendant, before proceeding to sell the property, received notices from the owners of the carriages and horses so seized, to the effect that unless the carriages and horses were restored to their several owners, proceedings would be immediately taken against the defendant. The notices were all substantially as follows :—

“ To JAMES SCOTT.

“ *Middlesex*.—By virtue of a warrant from the sheriff of *Middlesex* to me directed, I command you to appear at the next County Court to be holden in and for the said county, at the house known by the name of the Sheriff's Office, No. 24, Red Lion Square, on Thursday, the 24th day of August instant, to answer Hannah, Baroness de Rothschild, in a plea of taking and unjustly detaining her goods and chattels, (to wit) the goods and chattels by you taken as and for a distress for rent claimed to be due to Thos. Gray, Esq.

“ Dated the 19th day of August, 1843.

“ WILLIAM KEMP, Bailiff.”

Under these circumstances, the defendant Gray directed the carriages and horses which had been seized to be given up.

In 1855 the plaintiff, who was a puisne incumbrancer, whose security dated in 1836, filed a bill to redeem the first mortgagee, and on the 9th of December, 1856, obtained the usual decree against a mortgagee in possession, under which she sought to charge the first mortgagee for wilful default in not realising the property which had been seized under the distress. The defendant admitted that the property seized was of the value of 362*l.* 14*s.* The chief clerk, by his certificate, dated the 4th June, 1857, charged the defendant Gray with the sum of 362*l.* 14*s.*, being the amount which he might have realised

by the distress, but which he gave up in consequence of the notices; but the certificate proceeded to say, "that if the Court should be of opinion that he ought not to be so charged, there would then be due to him the sum of 730*l.* 16*s.* 8*d.*"

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—
Statement.

The plaintiff, the second mortgagee, in 1850 gave formal notice of her mortgage to the mortgagee in possession, but it was in evidence that the property was put up for sale in August, 1838, upon which occasion the second mortgage was mentioned to the first mortgagee.

The question now came on for the decision of the Court.

Mr. *Bacon* and Mr. *Amphlett*, on behalf of the plaintiff, submitted that though the defendant was not bound to distrain, yet that having taken possession of the property under the distress, he was not at liberty to relinquish it. That a carriage standing at livery was the subject of distress was long settled, *Francis v. Wyatt*(*a*); and that horses stood in the same position had been since decided: *Parsons v. Gingell*(*b*); *Lewis v. Gingell*(*c*).

Argument.
—

Mr. *Malins* and Mr. *Surrage*, for the defendant Gray.

In order to charge a mortgagee in possession with wilful default, there must be established against him, either fraud or gross negligence: *Hughes v. Williams*(*d*). A mortgagee in possession was not bound to engage in any suit(*e*), and was only bound to deal with the property in the same way as a prudent man would deal with his own: *Massey v. Banner*(*f*).

In this case it is obvious, that had the defendant sold the carriages and horses, it would, to use Lord Mansfield's

(*a*) Wm. Bl. 483.

(*b*) 4 C. B. 545.

(*c*) *Ibid.* note, 561.

(*d*) 12 Ves. 493.

(*e*) *Ibid.*

(*f*) 1 Jac. & W. 241.

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language in *Francis v. Wyatt*, have caused "the livery stables to be deserted and undone." (a)

That there would have been a risk in persevering after the notices received by the defendant, was clear, because the transaction took place in 1843, and it was not till 1847 that it was decided that horses standing at livery could be distrained on for rent. It was submitted, therefore, that the case of wilful default failed, and the certificate must be varied.

Judgment.

The VICE-CHANCELLOR:—

It is admitted that the mortgagee in possession was not bound to distrain. But then it is said he was bound to defend the action of replevin. If he had gone on after the notices he had received to try the question, and had failed, he would not have been entitled to add the costs to his mortgage debt.

The property was unquestionably not the property of the tenant, but of other people; and although by the ancient common law of England, the landlord is entitled under a distress to seize the property of others which is upon the premises, yet that stringent rule of law is subject to various exceptions. An attempt was made in the case of *Francis v. Wyatt* to bring a carriage and horses standing at livery within the exceptions; but the attempt failed.

The true doctrine of the Court is that a mortgagee in possession of the mortgagor's property is bound to use it as carefully as if it was his own. But surely it could not be contended that a landlord is guilty of neglect if he does not seize and appropriate, in payment of the rent, the property of third persons which happens to be found in the tenant's possession when a distress is levied. In this case the defendant levied the distress, but on receiving notice that the property did not belong to his tenant, and being threatened with legal proceedings if he persevered, he pru-

(a) Page 485.

dently declined to embark in the litigation. The courts of law gladly catch at any distinction to escape from the application of this harsh rule of law, which permits landlords to seize the property of other persons found on their premises; and what would have been the defendant's position if the case had been decided against him? It has never been decided that a mortgagee is bound to exercise this right, and I trust never will be. There must, therefore, be an order that the mortgagee is to be charged only with the sum of 730*l.* 16*s.* 8*d.*

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v.
GRAY.
Judgment.

MACDONALD *v.* RICHARDSON.
RICHARDSON *v.* MARTEN.

1858.
July 20.

JOHN WILLIAM LEACH, from 1846 to the time of his death, carried on the business of a commission agent and consignee with John Crowe Richardson, at Swansea.

The plaintiffs, who are legatees under the will of John William Leach, filed this bill against both the executors, alleging that the partnership was carried on without any written articles. The defendant, who is the surviving partner, alleged that the partnership was carried on under articles dated in March, 1841, which the plaintiffs contended were confined to a previous partnership.

The books of the firm were made up to the year 1849, except as to a few items.

John William Leach died on the 11th February, 1853, having by his will appointed Thomas Arnold Marten and his surviving partner, Richardson, his executors. Having by his will given certain small legacies, he gave the whole of his real and personal estate to his executors, upon trust for payment of his debts, and then on trust to pay 4 per cent. on the residue to his mother Ann Leach, for her life; and after her death he gave the residue to his sisters, Ann Jane Macdonald and Eliza Rachel Leach, in equal shares.

Where an executor has improperly employed the assets of his testator in trade, he will be made to account for and pay over those profits, although the persons in partnership with whom he had made those profits are not before the Court as parties to the suit, or in any other character than as witnesses to prove the amount of profits received by the executor.

Whether
Simpson v. Chapman, 4 De G. M. & G 154, is reconcilable with previous authorities—*Quare.*

1858.
 MACDONALD
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 —
Statement.

Ann Leach died on the 14th February, 1853.

On the death of the testator the plaintiffs alleged that Richardson, the surviving partner, took possession of the whole property of the firm, and treated it as his own. The amount of the testator's interest in the concern was not ascertained, nor his share in the goodwill valued, nor any investment made, and no account rendered; but the whole capital was employed by the surviving partner as if the firm was still subsisting. The only change made was, that a new set of books were opened.

The plaintiffs also alleged that Richardson claimed, as against the testator's estate, the interest charged by the bankers on advances made to the firm, but refused to account for the profits.

The plaintiffs charged that there remained in Richardson's hands a part of the testator's estate, of the value of about 7000*l*.

It appeared from the correspondence, beginning in 1854, that the defendant Richardson refused to account for the profits in trade which had accrued since the testator's death.

The plaintiff's bill prayed—

“For an account of the testator's personal estate, &c.

“An account of the partnership transactions, and of the monies received by Richardson before and after the testator's death, and for payment of what was due.

“An account of the property of the partnership at the testator's death, and of each partner's share in the capital.

“That the value of the goodwill might be ascertained.

“An account of the capital employed since the testator's death, and of the profits and sums retained or paid by the defendant on account of profits or capital.

“That the defendant might be charged with the profits made in trade since the testator's decease, and with annual rests; or if not ordered to account for profits down to the time of taking the accounts, that he might be charged

with interest on the capital of the testator remaining in trade, with yearly accounts from the time when the said profits should cease."

The defendant Richardson filed a cross bill against the plaintiffs (the legatees) and his co-executor, Thomas Arnold Marten, in which he alleged that in 1841 a partnership was established between himself, James Poingdestre, John Buxton, and the testator, under the title of John Leach & Co., for the purchase of ships' stores and provisions, &c. &c. The partnership was carried on under articles dated the 25th March, 1851, until the 30th June, 1846, when it was dissolved (under a power) as to Poingdestre and Buxton. Richardson and Leach continued in partnership until Leach's death in 1852; but during such continuation the name of the firm, in order to exclude any claim by the retiring partners, was Leach, Richardson, & Co.

The articles provided that in case of the death of either of the said partners, his representatives, if any, should be entitled to receive the estimated value for the remainder of the term, of the goodwill of any partner so deceased; unless the surviving partner or partners, in preference to making any payment, should offer the said representative on the terms of the said agreement, the same interest or share in the said co-partnership, as that held by the said partner previously to his decease.

The cross bill also alleged that on the death of Leach, Richardson became absolutely entitled, under the above articles, to the entirety of the partnership business, subject to Leach's interest in the goodwill for the remainder of the term, and also subject to Leach's share in the partnership assets, realised in cash, and to be realised as soon as it conveniently could without a compulsory sale, so as to injure the partnership business.

The cross bill also alleged that at Leach's death the partnership assets consisted of stock in trade, including "ships' stores," vessels and shares in vessels, and book debts, and that Richardson being desirous of carrying on business

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on his own account, at the request of his co-executor, and with the consent of the plaintiffs in the original suit, agreed to take the whole stock at a valuation, and accordingly debited himself with the amount of the valuation, in the accounts rendered by him to the residuary legatees. He also opened a new account with the bankers under the title of the new account, but the style of the firm remained the same.

The cross bill also alleged that Richardson was about to sell the vessels belonging to the partnership, when he received the following notice addressed to the executors of the testator :—

“GENTLEMEN.—We, the undersigned, being the legatees under the will of our late relative John William Leach, hereby authorise and request you to continue sending to sea, chartering, and insuring, all or any of the ships in which the said testator had any share or shares and interest, at the expense and risk of the testator’s estate, when, and so long as you may think in your discretion advisable. And we also authorise and request you to apply any part of the testator’s estate, whether principal or interest, to make up, if necessary, the yearly payment of 4l. per cent. thereon, given by the said will to the said Ann Leach.—As witness our hands this 6th day of December, 1852.

(Signed) “ANNE LEACH.

“ANNE J. McDONALD.

“ELIZA LEACH.”

The cross bill further alleged that Richardson and his co-executor Marten continued to send the ships to sea and to insure them, and that Richardson had accounted to Marten for the profits, and alleged that since Leach’s death he had paid 1300l., as the amount of profits received, for the testator’s share in certain ships; and alleged that up to the 30th June, 1855, there was due to the partnership on

all accounts (other than that of the ships), 2324*l.* 6*s.* 5*d.*, which he alleged he had placed to the credit of the executors.

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The cross bill further alleged that he, Richardson, had purchased the testator's share and interest in the vessels, and had accounted for the same; that the books had been very badly kept by the testator; and prayed that the trusts might be administered under the direction of the Court.

In 1855, Richardson entered into partnership with two gentlemen who were not parties to the suit.

Mr. *Bacon* and Mr. *W. D. Lewis*, for the plaintiffs, contended that it was proved by the evidence that the defendant Richardson had employed the testator's property in the business, without having appropriated a sufficient sum to secure the assets, or otherwise secured the property; and that fact being established, it was clear from the authorities that the plaintiffs were entitled to an account of the profits. *Crawshay v. Collins* (a) and *Wedderburn v. Wedderburn* (b), were cited.

Argument.
 —

Mr. *Malins* and Mr. *Speed*, for Richardson, the executor, and plaintiff in the cross suit, contended that by the articles under which Leach and Richardson continued to carry on the partnership, the surviving partner was entitled to the entirety of the business, subject to his liability to account for what he had in fact accounted. Secondly, it was contended that the suit was defective for want of parties, for admitting the liability of the defendant Richardson to account for the profits, that equity could not be worked out in the absence of his partners: *Simpson v. Chapman* (c).

Mr. *Greene* and Mr. *C. Hall* were present on behalf of the two partners who were not parties to the suit.

(a) 15 Ves. 218; s. c. 1 J. & W. 267.

(b) 4 M. & C. 41.

(c) 4 De G. M. & G. 154.

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The VICE-CHANCELLOR:—

These two suits are for the administration of the estate of the testator, John William Leach. He had from the year 1847 till his death carried on trade in partnership with Richardson. The trustees and executors of his will are Richardson and Marten. In the first suit the residuary legatees are plaintiffs, and the trustees and executors are the defendants. Richardson alone is the plaintiff in the second suit against his co-executor and the residuary legatees.

It is necessary to give some special directions as to the mode of taking the accounts relating to the testator's share in the partnership.

It appears that previously to the partnership between the testator and Richardson, which commenced in 1847, they had carried on the same trade in partnership with two other persons. This previous partnership, consisting of four persons, had been carried on under articles of partnership dated in 1841.

There seems abundant evidence that there were no articles of partnership between the testator and Richardson.

There is evidence of the complete dissolution of the partnership which had been carried on under the articles of the 5th of March, 1841; and there is abundant evidence from the declarations of Richardson himself in his letters, as well as by parol, that the partnership formed in 1847, and dissolved by the death of Richardson in 1852, was not carried on under any written articles of partnership.

It was a new partnership formed to carry on the old business, which had been carried on by the four former partners under the articles of 1841.

The nature of the business was such as to make the goodwill a matter of value. In the previous partnership for carrying on the same sort of business, the goodwill had been the subject of stipulation. It must, therefore, be held to be of some value, and the decree must deal with it accordingly.

But the most important question in the cause arises from the breach of trust by the executor, who employed assets of the testator in carrying on the business, and who continued to do so after the year 1855, when he formed a partnership with two other persons. The plaintiffs seek to make the executor pay to them all the profits which have been made by him through this breach of trust. But the executor, on the authority of a decision of the Lords Justices in the case of *Simpson v. Chapman* (a), insists that no inquiry can be directed on this subject in the absence of the persons whom he assumed as partners in the business in which he employed the assets.

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This proposition, supported by such authority, embarrassed me so much that I have taken time to consider the decision of the Lords Justices and the other authorities. It appears that no authority was quoted in the argument before the Lords Justices, and no authority is referred to in their Lordships' judgment on this point. But there are authorities inconsistent with the proposition.

In the case of *Freeman v. Fairlie* (b), in order to show what profits were made by a breach of trust of this kind, Lord Eldon ordered the executor to produce books in the custody of the executor's partners or agents who were not parties to the suit.

In the case of *Docker v. Soames* (c), the Lord Chancellor, speaking of the right of *cestuis que trust* to an account of profits made in this way, says:—"Should in any case a serious difficulty arise in tracing and apportioning the profits, this may be a reason for preferring a fixed rate of interest; at all events some inquiry is rendered necessary."

A similar doctrine was acted upon by the Court in the case of *Palmer v. Mitchell* (d), where the executors had employed the assets in carrying on business in partnership

(a) 4 De G. M. & G. 154.

(b) 3 Meriv. 43—45.

(c) 2 Myl. & Keen, 655, 673.

(d) 2 Myl. & K. note, 672.

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with persons not before the Court. The decree declared that the executors ought to be charged with the profits and advantages made of the testator's estate while employed by them in any trade or business since the testator's death.

If these authorities had been cited to the Lords Justices, it seems not probable that they would have overruled them without stating clear and satisfactory grounds.

The principle is, that it is the trustee or executor, and not his partners, who are to make good the amount of profits.

Where an executor employs assets in carrying on trade without any authority, he is bound to account for and pay over all the profits, or he may be charged with interest at the option of those beneficially entitled to the assets misemployed. This is a right personal against the executor.

If the assets have been employed in a trade carried on by the executor in partnership with other persons, the right to the account of profits made by the misemployed assets being a right to be enforced against the executor personally, it cannot include a right to call the partners of the executor to account for the share of profits paid over by them to the executor as their partner, nor can it include a right to make these partners account for all their dealings and transactions with the executor as their partner, because that right can only result from privity of contract.

Cases may occur in which those entitled to call the executor to account, may be held entitled to proceed to work out his rights against his partners under the partnership contract. But those who have traded on a partnership contract with the executor are not bound by any contract or duty to those to whom the executor is accountable for the misemployed assets or profits made by the misemployment. There does not seem to be any satisfactory ground on which they are to be considered as necessarily liable to account, not only to their partner, but to

persons having claims on him to which they were strangers, and for which they are not responsible. The utmost amount of their liability is to allow the executor to have his share of the profits. The dealings and transactions out of which those profits have arisen are to be governed by the contract of partnership, to which those entitled to call the executor to account are strangers. They have a right to call the executor to account, but no right to call to account persons with whom the executor has become a partner. The partners may be proper persons to call as witnesses to prove how much has been received by the executor as profits, and what amount of profits remain due to him. As in *Freeman v. Fairlie*, a production of the partnership books may be ordered.

But unless some extraordinary case occurs to confer right of suit against the partners, such as collusion with the executor, and refusing to produce the books, or to show the amount of profits received or receivable by the executor, they are not liable to be joined as parties to a suit against the executor. No such case of collusion or misconduct occurs in this case, or occurred in *Simpson v. Chapman*. The power which the judge has of modifying and adding to decrees in cases of this kind during the proceedings in chambers, greatly facilitates the administration of justice.

It seems to me, therefore, that there must in this case be a declaration and inquiry as to the profits made by the defendant Richardson from such part of the assets as was employed by him in the trade or business after the testator's death.

The objections raised at the hearing against the rights of the residuary legatees in consequence of the dormant suit of *Buxton v. Leach*, and other minor points, were disposed of at the time of the argument.

As to the claim of Marten, one of the executors, to be allowed 400*l.* for his trouble in the investigation of the

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accounts, it cannot be entertained so as to make it the subject of any direction in the decree.

Upon the whole case the proper decree, in both the causes of *Macdonald v. Richardson*, and *Richardson v. Marten*, will be as follows :—

Let the chief clerk—

1. Ascertain and certify what was due to the testator's estate at the time of his death in respect of his share in the capital and profits of the partnership between Leach and Richardson, and for that purpose order an account of the partnership dealings and transactions up to the death of the testator.

2. Ascertain and certify the value of the testator's share of the goodwill of the partnership business at his death, and declare that the executor is bound to pay and make good to the testator's estate what shall be found due for such share of goodwill with interest.

3. Declare that the executor is bound to account to the estate of the testator for all profits accruing from the employment of the estate of the testator in carrying on the trade and business after the testator's death.

4. Inquire and certify what part of the testator's estate was retained or employed by the executor in carrying on the business, and ascertain and state the amount of the share of the profits due to the estate of the testator under the aforesaid direction and declaration, but with liberty to the plaintiffs in *Macdonald v. Richardson*, to apply for leave to charge the defendant Richardson with interest instead of profits. The chief clerk to have liberty to adopt any accounts which shall be found to have been properly taken or acquiesced in by the plaintiffs or their agents, and, in making the inquiry, regard is to be had to the state of the books of the partnership which it was the duty of each to have kept, and to the length of time necessary to ascertain the state of the accounts.

Reserve further consideration.

Liberty to apply.

1859.

IN THE MATTER OF THE TRUSTS OF THE WILL
OF MARY COOMBE. June 30.

MARY COOMBE, by her will dated the 30th May, 1840, gave to Messrs. Robert and John Abbott all her monies and securities upon trust, in the first place, to pay her just debts and funeral expenses, and then on trust to permit her beloved niece, Mary Sanders, to have the use of all her furniture for her life, and to permit her to receive the dividends for her natural life to her separate use; and after her decease, on trust to apply the dividends and income for the maintenance of her children, and upon trust when and so soon as the youngest child of Mary Sanders should attain 21, to divide the said estate and effects among such of the children as should be then living.

After the appointment of assignees in bankruptcy under the Act of 1849, an assignment for value by the bankrupt of a reversionary interest cannot prevail against the right of the assignees in bankruptcy.

The will was proved on the 30th March, 1841, by both executors.

Mary Sanders, the niece, died on the 1st May, 1851, leaving four children, Daniel Coombe Sanders, the eldest, and Robert Sanders, the youngest, who attained 21 on the 1st May, 1858.

Daniel Coombe Sanders, who was in partnership with one Grove, in November, 1852, became bankrupt, and assignees were immediately afterwards appointed of his estate; his partner obtained a second class certificate, but he remained out of the jurisdiction.

On the 6th May, 1853, Daniel Coombe Sanders, in consideration of 95*l.*, assigned his reversionary interest in the fund to the Scottish Amicable Life Assurance Company. Prior to the assignment the Society inquired of the trustees if they had received notice of any assignment, to which the trustees replied in the negative.

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—
Statement.

On the fund becoming divisible the assignees in bankruptcy of Daniel Coombe Sanders claimed the fund, and the Society having also preferred a claim, John Abbott, the surviving trustee, paid the fund into court under the Trustee Relief Act.

On the 17th of May, 1859, the Society took out a summons for payment of the money to them, which was adjourned into court.

A notice of motion was also served to the same effect.

—
Argument.

Mr. Rogers, for the Scottish Amicable Life Assurance Society.

It is impossible to distinguish this case from *Re Barr's Trust (a)*, decided by Vice-Chancellor Wood, in which it was held, that an assignee for value without notice of the bankruptcy, was entitled in priority to the assignees under the bankruptcy.

Re Atkinson's Trusts (b) was also cited.

Mr. Malins, for the assignees in bankruptcy.

The decision in *Re Barr's Trust* proceeded on the old bankrupt law. But the question in this case depends on the Bankrupt Law Consolidation Act of 1849; and the latter part of the 141st section was added for the very purpose of remedying what was felt to be a defect in the old law. By that section it is enacted that after the appointment of the assignees neither the bankrupt, nor any other person claiming through or under him, shall have power to recover any property or debt, nor to make any release or discharge thereof, neither shall the same be attached as the debt of the bankrupt by any person, according to the custom of London, or otherwise; but such assignees shall have like remedy to recover the same in their own names, as the bankrupt himself might have done, had he not been

(a) 4 K. & J. 219.

(b) 2 De G. M. & G. 241.

adjudged bankrupt." The assignment by the bankrupt was therefore a nullity.

Mr. *Smale* appeared for the trustees who had paid the fund into court.

Mr. *Rogers* in reply.

All that the Act gives to the assignees is, the same right that the bankrupt himself had, but it is quite clear that the bankrupt could not have disputed the right of his own assignee for value.

The VICE-CHANCELLOR:—

The language of the 141st section is clear and decisive. The bankrupt, after the appointment of the assignees, had no power to deal with the property, and no assignment by him made after the appointment of assignees in the bankruptcy can confer any title. The decision in *Re Barr's Trust* proceeded on the previous bankrupt Acts(a), which contained no such language, and the absence of such language was, in fact, the ground of the decision. It is satisfactory to find that the late Act has remedied the defect in the law, which occasioned great hardship and injustice.

The assignees in bankruptcy are therefore entitled to the fund.

The trustees' costs must be paid out of the fund; and the other costs, of the summons and of the motion, must be paid by the Scottish Amicable Society.

(a) The Acts in force at the date of the bankruptcy in that case (1810), were 13 Eliz. c. 7; 1 Jac. c. 15; and the 46 Geo. 3, c. 135.

NOTE.—Subjoined is the 141st section of the 12 & 13 Vic.:—

"That when any person shall have been adjudged a bankrupt, all his personal estate and effects, present and future, wheresoever the same may be found or known, and all property which he may

purchase, or which may revert, descend, be devised or bequeathed, or come to him, before he shall have obtained his certificate, and all debts due or to be due to him, wheresoever the same may be found or known, and the property, right, and interest in

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such debts, shall become absolutely vested in the assignees for the time being, for the benefit of the creditors of the bankrupt, by virtue of their appointment; and after such appointment, neither the bankrupt nor any person claiming through or under him, shall have power to recover the same, nor to make any release or discharge

thereof, neither shall the same be attached as the debt of the bankrupt by any person, according to the custom of the City of London or otherwise, but such assignees shall have like remedy to recover the same, in their own names, as the bankrupt himself might have had if he had not been adjudged a bankrupt."

July 15.

RE THE TRUSTS OF THE WILL OF THE
REV. J. G. STORIE, DECEASED.

The assignee in insolvency held to be entitled to a policy of assurance on the life of the insolvent effected to secure a sum of money borrowed by the insolvent, but afterwards paid off, the policy having been effected at the expense of the insolvent, and mentioned in his schedule as one of the securities for the debt.

By an indenture dated the 10th of April, 1829, between John George Storie of the one part, and Charles Walker of the other part, after reciting that by his marriage settlement J. G. Storie was entitled for life to the income of 13,333*l.* 6*s.* 8*d.* 3 per Cents., less an annuity of 50*l.* per annum to Elizabeth Storie during the joint lives of herself and her husband, and reciting that J. G. Storie having occasion for the loan of 3600*l.* had applied to Charles Walker to lend him the same, and on the treaty for such loan it was agreed that a policy of assurance should be effected on the life of the said J. G. Storie for 3000*l.* as a collateral security for the said principal sum of 3600*l.* and the interest thereon, and that the said J. G. Storie should assign his life interest in the £13,333 6*s.* 8*d.* unto Charles Walker, his executors, administrators, and assigns, upon such trusts for collaterally securing the said 3600*l.* and interest as were thereafter expressed. And reciting that in pursuance of the said agreement the said Charles Walker, at the request and expense of the said John George Storie, had, by a policy of insurance dated the 10th day of April,

1829, insured the life of the said J. G. Storie in the Rock Life Assurance Office for 3000*l.* subject to the annual premium of 83*l.* 12*s.* 6*d.*, it was witnessed that in consideration of the sum of 3600*l.* to the said J. G. Storie paid by the said Charles Walker, the said J. G. Storie assigned to the said Charles Walker, his executors, administrators, and assigns, the income of the said 13,333*l.* 6*s.* 8*d.* upon trust that the said Charles Walker should receive the said income during the life of the said J. G. Storie, and apply so much thereof as should from time to time be necessary, in payment of interest at 5 per cent. on the said sum of 3600*l.*, and should apply so much and such other part of the said income as should be necessary in paying the premiums as the same should become due on the said policy of insurance, for the purpose of keeping the said insurance in force during the life of the said J. G. Storie; and also should, in case default should be made by the said J. G. Storie in payment of all or any of the instalments of the said 3600*l.* therein covenanted to be paid by him in reduction or satisfaction of the last mentioned sum, pay or retain out of the said income thereby assigned so much of the said instalments as should remain unpaid, until the whole of the said 3600*l.* and the interest thereof should be fully paid and satisfied; and also should permit the surplus of the said income thereby assigned to be received by the said J. G. Storie during his life. And it was thereby agreed and declared that the said Charles Walker should stand possessed of and interested in the said policy, and in the said 3000*l.* thereby secured, on trust for collaterally securing to the said Charles Walker, his executors, administrators, and assigns, the said sum of 3600*l.* and interest at 5 per cent. And upon trust that he, the said Charles Walker, his executors, administrators, or assigns, should, in case he, the said J. G. Storie, should die before the whole of the principal sum of 3600*l.* and interest should be fully paid and satisfied, recover and receive the

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said sum of 3000*l.* secured by such policy, and dispose of the same in payment and satisfaction of the whole or so much of the said 3600*l.* and interest as should then remain unpaid, and of all costs, &c. And then on trust for payment to the executors or administrators of the said J. G. Storie of the surplus of any of the said sum of 3600*l.* And upon further trust that if the said sum of 3600*l.* and interest and costs should be fully paid in the lifetime of the said J. G. Storie, the said Charles Walker should transfer the said policy and the said sum of 3000*l.* thereby assured, with all benefit and advantage thereof, unto the said J. G. Storie, his executors, administrators, and assigns, for their own benefit.

On the 17th of April, 1851, J. G. Storie, being in prison for debt, applied for his discharge under the Insolvent Debtors Act, 1 & 2 Vic. c. 110, and filed his schedule, in which he stated the debt due by him to Walker, and mentioned the policy of assurance as one of the securities for the debt. He was subsequently discharged under the Act.

Charles Walker died in October, 1856, having appointed Benjamin Lawrence and Robert George Smith his executors.

After the death of Walker, the executors paid the premiums.

J. G. Storie died in November, 1858, and on his death the insurance company paid Lawrence and Smith, Walker's executors, the sum of 4162*l.*, being the amount of the policy, and a bonus of 1162*l.*, which had accrued thereon.

The executors retained 3745*l.* 9*s.* 7*d.*, for debt, interest, and costs, and a claim being made by the representative of J. G. Storie, paid the balance of 430*l.* 13*s.* 10*d.* into court.

The assignee in insolvency of J. G. Storie, presented this petition for payment of the fund.

Argument.
 ———

Mr. *Caldecott* appeared for the petitioner, and claimed

the fund. The policy, though in the name of Walker, was really a policy by Storie, and the premiums were paid by him, or out of his income, assigned for that purpose to Walker. If, then, the insolvent had a beneficial interest, it was quite clear it passed to his assignee in insolvency.

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Argument.

Mr. *Bird*, for the representative of Storie.

A policy of assurance to secure a debt, is a mere contract for indemnity, and not property within the meaning of the Insolvent Debtors Act, so as to pass to the assignee: *Godsall v. Boldero* (a). It is quite clear that if the debt were satisfied *aliunde*, the policy became void. The company, however, had elected to pay the amount to the creditor, and that being so, there was, after satisfaction of the debt, a fund which formed a part of the debtor's estate in the hands of the creditor, who was therefore a trustee for the representative of the debtor.

Mr. *Deere Salmon* appeared for Messrs. Lawrence and Smith.

Mr. *Caldecott* in reply.

Godsall v. Boldero has been overruled. It had been argued as if this were a case of marine insurance, but the case of a life insurance stood on a different footing, and it had been so decided in *Law v. The London Indisputable Life Company* (b), and *The India and London Life Insurance Company v. Dalby* (c).

The VICE-CHANCELLOR :—

Judgment.

It is quite clear that *Godsall v. Boldero* has not been followed. There is no perfect analogy between a marine insurance against an event which may never happen, and an insurance on a life where the event contemplated must happen.

(a) 9 East, 72.

(c) 15 Jur. 982.

(b) 1 K. & J. 223.

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DECEASED.*

Judgment.

It has been argued that the policy was not the insolvent's property at the date of the insolvency, so as to pass to the assignee. I cannot accede to this view. Indeed, the policy was mentioned in the schedule filed by the insolvent in the Insolvent Court. I am of opinion, therefore, that the assignee is entitled to the surplus of the fund which remains after satisfaction of the debt, and which is in court.



April 21, 27

CLEMENT v. MADDICK.

A fraudulent intention in infringing copyright is not necessary to entitle the proprietor of the copyright to relief in this Court, if his right of property has been invaded.

THIS was a motion for an injunction to restrain the defendants from printing or publishing, or continuing to print or publish, any newspaper or other periodical paper, of which the name, style, or words, of *Bell's Life*, should form a part, or in any way occur; and from using the said name, or style, or title, of *Bell's Life*, either alone, or with any other words, or otherwise, by way of name, style, or title, to any newspaper or periodical, without the licence or consent of the plaintiffs.

Subsequently to the filing of the bill, the defendant Maddick assigned his interest in the penny paper to W. H. Stephens and R. V. Robinson, who were made parties by amendment.

The plaintiffs, by their affidavits, deposed that they had sustained considerable damage by the publication of the *Penny Bell's Life*; and the publisher deposed that application had been made to him for copies of the defendant's paper, under the impression that it was the plaintiff's paper at a reduced price.

The defendant, in his affidavit, deposed that he had no

intention of infringing the plaintiff's copyright, and that his motive in selecting the title complained of was simply to announce to the public that the paper was a sporting one.

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Statement.

The defendant further deposed that, in order to prevent the possibility of mistake, he had directed all letters addressed to his office to be carefully examined. He denied that he had the least fraudulent intention of infringing the copyright of the plaintiff.

Mr. *Malins*, Mr. *J. Hinde Palmer*, and Mr. *G. French*, for the plaintiffs, contended that the plaintiffs had a legal right to the exclusive use of the words *Bell's Life*, and that being established, the evidence clearly showed there had been an infringement against which this Court would relieve.

Argument.

Rodgers v. Nowill (a), *Prowett v. Mortimer* (b), *Burgess v. Burgess* (c), and *Shillibeer's case* (d), were cited.

Mr. *Bacon* and Mr. *Karslake*, for the defendants.

First, there has been in law no infringement; *Bell's Life* is a mere fanciful title, and there is no such person in existence, and no copyright can exist as to it.

Secondly, there has been no infringement in fact, inasmuch as the defendant's title forms but one word, and is distinct from the title of the plaintiffs.

Thirdly, in order to entitle the plaintiffs to the relief they ask, it is essential to establish a fraudulent purpose on the part of the defendant—a feature which is entirely wanting in the case. In *Burgess v. Burgess*, the Lords Justices refused the injunction, on the very ground that no fraud had been shown.

(a) 3 De G. M. & G. 614.
(b) 2 Jur. N. S. 514.

(c) 3 De G. M. & G. 896.
(d) *Coram V.C. Stuart*.

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On the whole, it was submitted that no case had been made out for an injunction.

The VICE-CHANCELLOR:—

This is an application in support of the right to property. It has been argued on behalf of the defendant, that unless a fraudulent intention is made out, the plaintiffs are not entitled to an injunction. This is a view of the law to which I cannot accede. Lord Cottenham, in the case of *Millington v. Fox (a)*, has declared that where a trade-mark has been innocently and even unconsciously made use of to the injury of another, the owner of the trade-mark is entitled to the protection of this Court.

The present case is reasonably plain. The defendants are obliged to admit that they would not be justified in publishing a newspaper under the title of *Bell's Life in London*, simply—an admission they could hardly refuse to make; but if so, what is the effect of adding to the title the word "*Penny*?" It has been argued that the title *Penny Bell's Life* is, in effect, one word, and that the effect of superadding the price is entirely to alter the title. Still, the meaning must be, *Bell's Life for a penny*.

It has been argued also that the title of the defendant's paper could not possibly deceive; but the answer to that argument is, that the defendant Maddick himself thought it prudent to direct that all the letters addressed to his office should be carefully examined before they were opened, in order to avoid opening any of the plaintiffs' letters. Why did the defendant give these directions? Because he knew that the titles of the two papers were so similar as to make mistakes probable. But the case does not rest there, because the plaintiff has clearly shown that application has been made at his office for copies of the penny paper. It is said that only one mistake has been proved; but the answer to that argument is, that the penny

(a) 3 M. & Cr. 338.

publication is only a recent one. But how did this one mistake occur? Because the title of the two publications was so similar as to mislead the person who despatched that letter. This possibility of mistake (the plaintiffs having an exclusive right to the title) is sufficient to entitle the plaintiffs to the protection of the Court.

The defendants' whole case appears to rest on the fact that they intended to commit no fraud; that they had no fraudulent intention in adopting the words *Bell's Life*, and thought that by prefixing the word "penny" to the title they had sufficiently warned the public that they were not purchasing the plaintiffs' paper. But the absence of a fraudulent intention is no defence against an application to the Court for an injunction by the person whose property has been injured. There must, therefore, be an injunction in the following terms:—

That the defendants, their servants, workmen, and agents, may be restrained from printing, publishing, or continuing to print or publish any newspaper or other periodical paper with or under the name or style of the *Penny Bell's Life and Sporting News*; or with or under any name or style of which the name, style, or words of *Bell's Life* shall form a part, or in any way occur; and from using the said name, style, or title of *Bell's Life* by way of name, style, or title to any newspaper or periodical, without the licence or consent of the plaintiff.

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March 23, 24, THE OFFICIAL MANAGER OF THE ATHENÆUM
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The shareholders in a joint stock company duly registered are not bound by debentures improperly issued, in a manner not authorized by the deed of settlement, although signed by directors and sealed with the seal of the company; and a *bond fide* purchaser is not entitled to sue the company on such debentures, although a transfer of the debentures was registered by an officer of the company, and two half-yearly payments of interest had been made.

ON the 10th of May, 1856, this bill was filed by the Athenæum Life Assurance Society against Alexander Gopsell Pooley, Richard Holmes Laurie, and Josiah Bartlett, praying for a declaration that seven debentures for 500*l.*, dated the 19th July, 1854, executed by the company under the common seal in favour of the defendant Pooley, and transferred by him to the defendant Laurie, might be cancelled.

On the 2d May, 1851, the society was formed by a deed of settlement of that date, in which the various clauses material to the question raised in this suit were as follows:—

1. That the several persons now or hereafter becoming parties hereto, and who are hereinafter designated shareholders, and all such other persons as shall hereafter become shareholders, shall, while holding shares in the capital stock hereinafter mentioned, be and constitute a joint stock company or society within the meaning of the Acts of Parliament hereinbefore referred to, to be called the Athenæum Life Assurance Society, and shall for that purpose pay up in full the shares respectively held by them, and perform the several engagements herein contained, and on the part of the shareholders to be observed and performed. And that such society shall be taken to be formed from the day of complete registration of the company, and shall continue until the same shall be dissolved and the affairs wound up.

2. That the business of the society shall be to make and effect all or any assurances on lives or survivorships on any contingencies relating to or connected with lives or

survivorships which may be effected according to law ; and also to grant and to purchase, sell and resell endowments or annuities either for lives, or for years, or on survivorships, and either immediate or deferred, reversionary or contingent, and also life, reversionary, and other personal estates and interests, and to advance money by way of loan on personal security ; and generally to carry on the business of Life Assurance and of an Annuity, Endowment, Loan, and Reversionary Interest Society in all their respective branches and departments, or in such of the said branches or departments only as the directors shall deem it expedient and advantageous to carry on such business respectively.

3. That the business of the society shall be carried on at its offices, at 30, Sackville Street, Piccadilly, in the county of Middlesex, or at such other place or places, either in addition to or in lieu thereof, as the directors for the time being shall from time to time appoint.

4. That the capital stock of the society shall in the first instance, and subject to the power of increasing the same hereinafter contained, consist of ten thousand pounds in ten thousand transferable shares of one pound each, to be paid as herein provided : Provided nevertheless, that in case the whole of the said ten thousand shares shall not be subscribed for or disposed of, the shareholders of the society for the time being shall continue associated and bound under and by these presents ; and these presents and the power and provisions herein contained shall continue and be in force, and be valid in respect of the shares for the time being subscribed for or taken, in like manner as if the number of such shares had been the whole number of shares agreed or intended to issued.

7. That in case at any general meeting, ordinary or extraordinary, fifty shareholders holding together five hundred shares shall not be present and proceed to business within an hour after the time fixed for the meeting, no business

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shall be done, but the meeting, if convened only on special requisition, shall stand absolutely dissolved; but in every other case shall stand adjourned to that day week at the same hour and place, and so on from week to week, from day to day, or hour to hour, as often as the same shall happen, until at some such meeting the required number of shareholders holding such shares as aforesaid shall be present and proceed to business within one hour from the time fixed for such meeting; but any such meeting as last aforesaid shall not afterward be rendered incompetent to transact business by reason of the departure of any shareholder or shareholders after the chair shall have been taken.

12. That it shall be competent for any extraordinary general meeting and no other, and such meeting and no other is hereby empowered by a majority, which shall consist of at least two-thirds in number of the shareholders of the society for the time being, or of the holders of policies of the society for life, and for not less than five hundred pounds each, on the participating scale, and on which two annual premiums at the least shall have been then paid, and also of two-thirds in number of the shareholders, and the said qualified holders of policies present, personally or by proxy, at the meeting, and which shareholders shall hold together at least two-thirds of the shares in the said capital stock of the society, which for the time being may have been subscribed for by any resolution or resolutions, to increase at any one time, or from time to time, the capital stock of the society; and for that purpose to create a sufficient number of new or additional shares of the same amount per share as the said present shares of one pound each, as to each meeting shall seem fit, provided that such addition or additions to the capital of the society do not exceed in the whole the sum of nine hundred and ninety thousand pounds, and to make all other changes, and do all other acts consequent

thereon or incidental or necessary thereto; and also to empower and require the directors to borrow and take upon mortgage of the real estate or chattels real belonging to the society, or on such securities as to such meeting may seem fit, any sum or sums of money which such meeting shall deem expedient, and which the directors for the time being are not authorized to raise under the power in that behalf hereinafter contained, not exceeding in the whole the sum of fifty thousand pounds: Provided always that no general meeting, ordinary or extraordinary, shall have power so to affect or alter the rateable division of the profits and liability to the losses of the society as between the shareholders, as to render the shareholders entitled to such profits or liable to such losses, otherwise than in proportion to the amount and number of the respective shares held or subscribed for by them in the capital stock of the society, or to affect or alter the provisions hereof for the indemnity of the officers or the dissolution of the society.

35. That the directors shall also have full power and authority on behalf of the society to receive, and with the consent of an extraordinary general meeting in the manner hereinbefore provided, to borrow on mortgage, or otherwise, and also at their own absolute discretion, and in the usual and ordinary course of the business of the society, to invest, lay out, or advance, at interest, on Government securities, or on such personal or other security as they shall think fit and advantageous, and they lawfully may, such monies, or such part of the monies and funds of the said society, as they *shall think expedient*.

The company was completely registered on the 14th of May, 1851, as appeared by the certificate of the Registrar of Joint Stock Companies.

On the 16th of May, 1851, a meeting, purporting to be an extraordinary general meeting of the shareholders, was held at the offices of the company, over which the de-

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defendant Bartlett presided as chairman, when the following resolutions, *inter alia*, were passed:—

1. That the capital stock of this society be increased from 10,000*l.* to 100,000*l.*

3. That the appointment of Henry Sutton, as manager, be confirmed as settled by the Board of Directors on the 19th of April, 1851.

4. That the directors be hereby empowered to borrow any sum or sums of money not exceeding in amount the present increased capital of the company, on debentures under the common seal, or on such other security as to such directors shall seem fit.

There were present at the meeting only ten shareholders, and no policy holders. There were in fact at that date only twenty-nine shareholders in the company, of whom one was a young lady aged thirteen, and several were infants or persons under disability. It was proved in evidence that search had been made in the newspapers published about that date, but that no advertisement announcing the meeting could be found. There was no record in the books of the company of any other general meeting of shareholders, ordinary or extraordinary, and there was evidence that none such had in fact been held.

In June, a committee, called the Finance Committee, made a report, approving of the purchase of Westminster Improvement Bonds to the extent of 10,000*l.* On the 14th of July, the directors agreed to confirm a contract which had been entered into by the defendant Bartlett with the defendant Pooley, for the purchase by the society from the latter of the bonds in question to the extent of 10,000*l.*, bearing interest at 5*l.* per cent. The transaction was subsequently completed as follows:—

The company had at that time 4500*l.* in the bank, of which 4000*l.* had been recently borrowed from a Mr. Agar, for which the directors gave Pooley a cheque. They also gave him the seven debentures in question, dated the

19th of July, 1854, and 2000 shares in the company. The defendant Pooley thereupon handed to the company Westminster Improvement Bonds, of which he had recently a very large amount in his possession, of the ostensible value of 10,000*l.*, but which about that time were selling at 75 per cent. of the nominal value, and shortly afterwards became so depressed as to be of little or no value. The debentures were in the following form:—

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Debenture No. 27. Amount 500*l.*

By virtue of the deed of settlement of the Athenæum Life Assurance Society, bearing date the 2d day of May, 1851, and registered pursuant to the Acts for the registration, incorporation, and regulation of Joint Stock Companies, and by the direction and consent of more than two-thirds of the shareholders of the said company present at a meeting convened for the purpose, the said society, in consideration of 500*l.* advanced to them for the purposes of the society by Alexander Gopsell Pooley, of Victoria Grove, Brompton, in the county of Middlesex, do hereby covenant with the said Alexander Gopsell Pooley, his executors, administrators, and assigns, to repay the same to him or them, or as he or they shall direct, on the 23d day of December, 1856, with interest thereon in the meantime at the rate of 5*l.* per cent. per annum, to be computed from the 19th day of July instant, and payable half-yearly on the 1st day of January and the 1st day of July in each year, so long as the said sum of 500*l.* shall remain unpaid to the said Alexander Gopsell Pooley, his executors, administrators, or assigns, by the said society, the first payment of such interest to be made on the 1st day of January next; but if at any time before the expiration of the period above mentioned any portion of the said sum of 500*l.* shall be repaid them, such interest shall be payable only on the portion remaining unpaid, and the

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covenant on the part of the said society to pay such interest is, nevertheless, only on condition that the stipulations following be complied with.

1st. The holder of this debenture is in all cases, when required by the manager, to produce the same to him for inspection.

2d. This debenture to be delivered up to the society on payment of the principal.

Given under the common seal of the society this 19th day of July, 1854.

The transaction was stated as follows in paragraph 13 of the bill:—

“The cheque on the company’s bankers for the sum of 4500*l.*, so fraudulently obtained by, and given as aforesaid to the said Josiah Bartlett, for the said Alexander Gopsell Pooley, and in part payment of the alleged purchase-money of the said bonds, was duly cashed by the company’s bankers; and the plaintiffs have lately discovered that a portion of the said consideration of 4500*l.*, was received by, or came to the hands of the defendant Josiah Bartlett for his own use.”

Bartlett admitted in his answer having received a part of the amount, but alleged that it was a loan from Pooley to himself.

In October, 1854, Pooley transferred the debentures to Ebenezer Ball Brown, a broker, for the purpose of having them sold; and on the 7th of December in that year, Brown acting for Pooley, sold them to the defendant Laurie for the sum of 3260*l.*, the ostensible value being 3500*l.*

On the 8th of December, Mr. Laurie took the bonds to the office of the company to have them registered, where they were stamped with the name of the company, and with the word “registered.” In the company’s book the words were “stamped to be transferred.”

In January and July, 1854, two half-years’ interest was paid on the bonds at the office of the company.

The Westminster Improvement Bonds were subsequently sold for the sum of 790*l*.

In 1855, the defendant Bartlett was requested to resign, and in December of that year a committee was appointed to investigate the affairs of the company, which ultimately reported in favour of resisting the claim made for interest on the debentures sold by Pooley to Laurie. The committee at the same time recommended that the claim on certain debentures which had been given to Mr. Agar who had advanced 4000*l*. to the company, should be admitted.

The defendant Laurie, on the 5th of March, 1856, commenced an action against the company for interest due on the debentures, and a bill was accordingly filed, and an injunction granted, to restrain the action. The bill prayed—

1. That it might be declared that the debentures in the hands of the defendant Laurie, were fraudulently obtained from the company or the directors, and were invalid; and that Laurie might be decreed to deliver up the same to be cancelled.

2. That Pooley and Laurie might be restrained from proceeding with the action at law, commenced in Pooley's name against the company for payment of the interest on the said debentures, and from commencing any other action.

3. That the defendants Pooley and Bartlett, or one of them, might be decreed to repay 4500*l*., fraudulently obtained from the company, or from the directors, in part payment of the alleged price of Westminster Improvement Bonds, with interest at 5*l*. per cent., from the 19th of July, 1854.

4. That the defendants Pooley and Bartlett, or one of them, might be decreed to deliver up the 2000 shares in the company, fraudulently obtained, as part of the said price, &c., or to make good to the plaintiff the value thereof.

5. Or, if necessary, that the defendants Pooley and Bartlett, or one of them, might be decreed to restore to the plaintiff the said Improvement Bonds, or such of them

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as should seem right, or pay to the plaintiffs the present value thereof, with such interest as to the Court should seem right.

6. That all necessary accounts and inquiries might be directed and made, &c.

On the 12th of July, 1856, the company was ordered to be wound up under the Acts of 1848 and 1849; and on the 6th of August following, Robert Palmer Harding was appointed official manager.

On the 6th of February, 1857, the bill was amended by making the official manager plaintiff, by striking out the allegations of fraud as to Laurie, and by adding certain averments, mainly to the effect that the issuing of the said debentures, and the purchase of the Westminster Improvement Bonds, were not the acts of the company, or authorized by them.

Argument.
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Mr. *Malins* and Mr. *W. D. Lewis*, for the plaintiff.

It is established as a fact in the cause, that these debentures were not issued by the directors, with the consent of a meeting of shareholders duly convened, and constituted in conformity with the deed of settlement. It followed from the authorities that they were not binding on the company. The directors were trustees for the shareholders, and could only bind them when their authority under the deed was strictly pursued, or when every individual shareholder sanctioned their acts: *Ridley v. The Plymouth Grinding Company (a)*. Joint Stock companies (to adopt the language of Chief Justice Jervis) are not to be treated as ordinary trading partnerships; they are only bound by contracts made by the directors within the scope of their authority. The public have no right to complain; they know that the company is acting under the sanction and direction of a deed of settlement, &c., and

(a) 2 Ex. 711, 717.

they have a ready access to that deed: *Smith v. The Hull Glass Company* (a). In the most recent case on this subject the House of Lords, affirming the principle of the decision of this branch of the Court, which had been varied by the Lords Justices, adopted the view of the law propounded in the cases above cited: *Ernest v. Nichols* (b).

Secondly, it is indisputable that Pooley could not himself enforce these securities against the company. He knew, or must be treated as knowing, that the directors had no authority to issue them. The debentures, on the face of them, stated that the grantee had advanced 500*l.* for the purposes of the Society; that, Pooley knew, was untrue. It was clear from the authorities that Laurie, the assignee, was in no better situation. He knew he was dealing with the debentures of a young company, but he made no inquiry, though any inquiry would have disclosed the real nature of the transaction.

It was submitted that these debentures were subject to the same equities in the hands of Laurie as of Pooley.

But further: the debentures are a *chose in action*, and that alone prevents the assignee from being in a better situation than his assignor. The assignee of a bond is subject to the same equities as the obligee: *Coles v. Jones* (c); *Turton v. Benson* (d); *Cator v. Burke* (e); *Mangles v. Dixon* (f), where the authorities are reviewed.

It would be said that the case of *Agar v. The Athenæum Life Assurance Company* was a decision in favour of this company; but that case differed from this, by the fact of the money advanced by Agar having reached the company—a circumstance which would deprive the official manager of any equity for relief in this court, without doing full justice to the lender.

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(a) 11 C. B. 926.

(b) 6 Ho. Lds. Ca. 401.

(c) 2 Vern. 691.

(d) 2 Vern. 764.

(e) 1 B. C. C. 434.

(f) 3 Ho. Lds. Ca. 702.

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Mr. Bacon, Mr. Craig, and Mr. Locock Webb, for the defendant Laurie.

It is admitted that Mr. Laurie is the holder for value of debentures issued by the directors at the company's offices, bearing the common seal, and to all appearance valid instruments. But two objections are raised to these instruments: first, that the directors were not authorized by a duly constituted meeting to issue debentures at all; and secondly, it is said that Mr. Laurie ought to have made proper inquiries as to the validity of these instruments, and that not having done so, he is not in a better situation than his assignor, and cannot enforce them against the shareholders.

With regard to the dry legal question of the directors' authority to issue these bonds, it had been decided in a court of law in an action against this very company that the absence of some of the formalities prescribed by the deed of settlement did not disentitle a *bonâ fide* holder of debentures from recovering against the shareholders: *Agar v. The Athenæum*(a). It would be strange if this Court should take a more technical view than a court of law. The defendant asked no relief from this Court. All he asked was to be allowed to avail himself of his legal rights to make the most he could of that thing which he purchased openly and fairly. On what principle of equity ought his legal rights to be controlled by this Court? Even assuming that the shareholders were innocent parties, so was he. Why, then, should his rights be made subordinate to theirs? It is an elementary principle of this Court that where two parties are equally free from blame, this Court will leave them to their legal rights. The cases which had been cited with reference to the Joint Stock Registration Act do not apply, because if the plaintiff's story were true a fraud had been practised, against which no inspection of the deed could have secured a purchaser.

(a) 3 C. B. N. S. 725.

The case of *Ernest v. Nichols* (a) decides merely that the contract was not within the powers of the company, and was not under seal. In the case of *Bill v. The Darent Railway Company* (b) the Court said, "These Acts of Parliament are construed as if they were partnership deeds. To violate them may be a breach of trust as between the directors and the shareholders, but acts not done according to them may bind the company."

But secondly, it is said that Mr. Laurie is not entitled to recover, because he ought to have made inquiry; but the answer to that is, that he did inquire, and took the debentures to the company's offices and had them registered by the company's officer. What more could he do? There was nothing in the transaction to excite suspicion. The issuing of debentures was one of the most ordinary acts of an insurance company. But then it was said that Laurie held these debentures subject to all the equities subject to which Pooley held them. But what was there to prevent Pooley from enforcing them? That the Westminster bonds were worth more than the cash advanced was not disputed. It is submitted that on both grounds the plaintiff's case as against Laurie fails, and as against him the bill must be dismissed with costs.

Mr. *De Gex*, for the defendant Pooley.—The only relief asked against Pooley is, that he may be decreed to repay the sum of 4500*l.* which he received for the debentures, and to deliver up the 2000 shares in the company. As to the shares they are a *damnosa hereditas*, which Mr. Pooley will be glad to get rid of. But why is Mr. Pooley to repay the 4500*l.*? It is proved by the plaintiff himself that at the time the transaction took place, the Westminster Improvement Bonds were worth upwards of 7000*l.*, and would have produced that sum had they been sold. It

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(a) 6 Ho. Lds. Ca. 419.

(b) 1 H. & N. 405.

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is submitted that the plaintiff is entitled to no relief against Pooley, and as against him the bill must be dismissed with costs.

Mr. *F. O. Haines* appeared for the defendant Bartlett.

The following cases were also cited:— *The Royal British Bank v. Turquand* (a) ; *Brydon v. Warwick Canal Company* (b).

The VICE-CHANCELLOR:—

The plaintiff represents the whole body of the shareholders in the company, and the complaint made by the bill is, that certain debentures signed by the directors, and sealed with the company's seal, have been issued in contravention of the deed of settlement. The question is, whether these debentures thus issued, are to be held generally binding on the shareholders; and if not, whether a *bond fide* holder for value, without notice of any infirmity which could make the debentures not binding upon the great body of the shareholders, is entitled in this court to recover the amount of the debentures as against the great body of the shareholders.

It has been established that the debentures were not authorized in such a way as to be binding on the shareholders generally.

The provisions of the deed are very clear in this respect. An extraordinary general meeting was necessary, and, in order to be properly constituted, it was necessary that it should be attended by at least fifty shareholders. These debentures, however, were issued, not in pursuance of any extraordinary meeting, but at a meeting which was held in 1850, and were acknowledged in the shape of a resolution by a great body of the shareholders at a meeting on the 16th of May, 1851, at a time when the

(a) 6 E. & B. 327.

(b) 4 De G. M. & G. 711.

company was not completely formed, and when it consisted only of twenty-nine shareholders, of whom several were infants and under incapacity.

It would seem, therefore, that these debentures were not issued in such a manner as to make them binding on the shareholders, in accordance with the provisions of the deed of settlement.

This was a company registered under the Joint Stock Companies Act; and the purpose of the Act (7 & 8 Vict. c. 110), was to give notice to all those dealing with a company, what acts the company was authorized to do, and what was the amount of its capital, and what must be done in accordance with the terms of the deed of settlement, by the directors, in order to enable them to bind the shareholders. In the case of *Ernest v. Nicholls* (a), in the House of Lords, Lord Wensleydale said, that "The stipulations of the deed, which restrict and regulate the directors' authority, are obligatory on those who deal with the company. The directors can make no contract so as to bind the whole body of shareholders, for whose protection the rules are made. Unless they are strictly complied with, the contract binds the persons making it, but no one else." This was Lord Wensleydale's language, after making observations upon the provisions of the Registration Act, and noticing that the Act required the deed of settlement to be registered, so that all the world should have notice who were the persons authorized to bind all the shareholders. There are other passages in that judgment to the same effect, and at page 422, when speaking of a contract made by the directors, but not in such a form as to bind the shareholders, he goes on to say, "The contract has no force whatever, until approved by the majority of the votes of the shareholders present at a meeting summoned for that purpose, according to the latter part of the 29th section (7 & 8 Vict. c. 110);

(a) 6 Ho. Lds. Ca. 419.

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therefore, if there has been no such meeting, the contract for this purchase, as well as the covenant to indemnify founded on it, is undoubtedly void;" and at page 423, he says: "The shareholders at large have this protection, that they can be liable only through their directors, acting under the authority of the deed, and of the Act of Parliament."

If the purpose of registration be that all the world, and those dealing with the company, may have notice of what is valid and binding upon the shareholders, there can be no question in this case; for it is clear, that the debentures were not issued by the directors in pursuance of a general meeting, so as to bind the shareholders.

But the supreme branch of this Court has taken a different view as to the effect of the Act of Parliament, and as to the liability of shareholders. I allude to the observations of the late Lord Chancellor, and of the Lords Justices, in *Greenwood's case* (a).

In that case Lord Chancellor Cranworth is reported to have said, "It is clear that the liability to creditors is not materially affected, and the Legislature has not only not exempted the shareholders from their ordinary obligations as partners, but expressly enacted that they shall remain liable, subject only to the limitation as to three years in a particular case."

Amid these conflicting views, I feel bound to adopt that which was taken in the House of Lords, and I consider that in this case those dealing in the market for the debentures of this company were bound to use reasonable caution in ascertaining the authenticity of those documents which they made the subject of purchase. As to the case in the Court of Common Pleas, it seems to have been held that where debentures recited that the money had been paid for the purposes of the company, the official manager,

(a) 3 De G. M. & G. 459, 479; s. c. 2 Sm. & G. 95.

as representing the company, was estopped from proving anything to contradict that recital, upon the ordinary principle, that if he came for equity, he must do equity. Where money has been actually paid for the purposes of a company, and the official manager seeks relief against the person who has paid it, the Court would refuse relief unless on the terms of repayment of what had been paid for the purposes of the company.

A *bonâ fide* purchaser for value without notice is always favoured in this court; but the rule of the Court is plain, that as between two parties equally innocent, a *bonâ fide* purchaser cannot be in a better position than the person from whom he made the purchase. There can be no doubt that Laurie paid his money for the debentures which he holds. But the nature of the transaction shows that Brown, through whom he purchased, must be considered as his agent, and Laurie in reference to his position with Brown, and his duty of inquiring into the authenticity of the documents, must be regarded as bound by the law of notice. It is the duty of those who deal in such securities to satisfy themselves, by inquiry, that the instruments are authentic, and issued in such a way as to bind the shareholders. There can be no great difficulty in making that inquiry. The Act requires that advertisements of all extraordinary meetings shall be inserted in the newspapers; yet it appears that Brown made no inquiry whatever upon this subject, and though he is a *bonâ fide* purchaser for a valuable consideration, he was a *bonâ fide* purchaser in a very suspicious transaction. By an unauthorized act these debentures were issued to Pooley, who paid for them by some instruments which turned out to be almost worthless.

An argument has been raised upon the ground that the officer at the public office of the company, received notice of the transfers from Pooley to Brown, and from Brown to Laurie, and that upon these transfers there was affixed the

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seal of the company, and the name of their secretary, whose name was also attached to the debentures. But still, there remains the original vice in the debentures—that they were issued without authority—a vice which cannot be cured by a mere formality. Both Brown and Laurie were bound to make inquiry to a reasonable extent, whether the powers of the company had been duly exercised. And having made no such inquiry, there must be an order for a perpetual injunction, to restrain the action brought upon the debentures. The decree would be without prejudice to any proceedings which Laurie might be advised to take against those who signed the debentures, or against Pooley and Brown, from whom he derived them. No order as to costs.

This decree was affirmed on appeal to the Lords Justices, on the 13th of December, 1858.



March 5, 7, 8.

PAYNE v. MORTIMER.

An obligation, voluntary as to the person in whose favour it was originally created, ceases to be voluntary in the hands of a transferee for valuable consideration. Therefore, where M. granted a voluntary bond in favour of his children, which, with his privity, formed the consideration on the faith of which they married and executed settlements, the Court held, that the bonds, though voluntary in their inception, had acquired the character of a debt for valuable consideration.

BY an indenture of settlement dated the 31st day of May, 1842, made on the marriage of the plaintiff, Elizabeth Caroline Payne, the daughter of the testator, Edward Horlock Mortimer covenanted with the trustees, to pay during his life 100*l.* a year for the separate use of the said plaintiff; and further, that his executors should, within twelve months after his decease, pay to the trustees 5000*l.* with interest at 4 per cent. from the day of his

death upon the trusts therein mentioned, for the benefit of the said plaintiff and her husband, and the issue of the marriage. The trustees of this settlement were admitted to be specialty creditors to the extent of the covenant.

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On the 29th of September, 1842, the testator executed a bond whereby he became bound to Edmund Mortimer, the defendant T. R. B. Mortimer and Joseph Williams, who had subsequently died, in a penal sum of 57,600*l.* The bond recited that the obligor had eight children by his first marriage, viz. four sons and two daughters therein mentioned; and that he was desirous of making due provision for his said six children in the event of his death, and that he had therefore agreed to enter into the said obligation to secure to the said trustees the payment by his executors of the sum of 28,000*l.*, within six months after his decease. The condition then declared the trusts of the said sum to be that the trustees, on receiving the said sum of 28,600*l.*, should forthwith pay the same to and among his said six children, in the following proportions:—To T. R. B. Mortimer, 4350*l.*; to J. L. Mortimer, 5250*l.*; to J. B. Mortimer, 6000*l.*; to Elizabeth Caroline Payne (the plaintiff), 1000*l.* to her separate use; to R. L. Mortimer, 6000*l.* to her separate use. And in case either of his sons or daughters should die before the said sums should become payable to him or her, then upon trust to pay the said sum which he or she would have been entitled to by virtue of the said bond, to the survivor or survivors of them, in like proportions as the said sum of 28,000*l.* was directed to be paid to them respectively."

In the year 1843 it was in contemplation that there should be a marriage between R. B. Mortimer and J. B. Mortimer, two of the testator's sons, and the two daughters of Mr. Payne; and with a view to such marriage a correspondence took place between the testator and Mrs. Payne, in the course of which the testator wrote and sent to Mrs. Payne the following letter:—

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"MADAM,

"August 21st, 1843.

"I have been in communication with my solicitor, which has prevented my writing before. As I informed you, I gave a bond to trustees during my illness last year, which was for the benefit of my children; but it is therein specified that should either die before myself, their portion would fall among the survivors. This bond cannot, I find, be altered under any circumstances, but my sons could give a bond which, I trust, will be satisfactory."

It was arranged that the sums to which the sons of the testator would be entitled under the bonds, were to be included in the settlement made on the marriage; and Mr. Payne's solicitor, on the 30th of August, 1843, wrote to the solicitor of the testator, as follows:—

"The sums to which the intended husbands would become entitled under the above bond are intended to form part of the settlements, and I will therefore thank you to furnish me with a copy of the bond without delay."

A copy was accordingly sent, in compliance with such request.

The marriage between the parties was soon after celebrated; but prior to such marriage two settlements were executed, dated the 20th of October, 1843. The settlement on the marriage of T. R. B. Mortimer was between the intended husband, of the first part, C. H. Payne, the intended wife, of the second part, C. Payne and Albinia Payne (the parents of the intended wife) of the third part, and F. T. New and B. Smith (the trustees) of the fourth part; by the settlement all the interest of the intended husband in the bond of his father was settled on the trusts of the deed.

A similar settlement was executed on the marriage of the other brother, which was to the same purport.

The testator died on the 15th November, 1857, having appointed T. R. B. Mortimer and W. A. T. Payne his executors.

The testator's personal estate was insufficient to pay his specialty debts. There was no real estate.

The claim :—A bill was filed to administer the testator's estate, in which a claim was made by the trustees of the plaintiff's settlement to prove under the covenant in her settlement as for a specialty debt, and her claim was not disputed. The trustees of the settlement also claimed for the amount of the bond as specialty debts. This claim was disallowed by the chief clerk. A summons was taken out to vary the chief clerk's certificate.

In support of the claim an affidavit was produced from the solicitor of Mr. Payne and from the trustee of the settlement—"That the two marriages were agreed to by the parents of the intended wives, on the faith of the provision made by the testator for his two sons respectively."

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Mr. Bacon and Mr. Freeling, in support of the summons.

Argument.

A contract which is voluntary in its inception may by *ex post facto* matter cease to be voluntary in the hands of those who have given value on the faith of it. The case of *Prodgers v. Langham* (a), decided as expounded by Lord Eldon, in *George v. Milbanke* (b), that the feoffment of a voluntary feoffee was good against creditors. In the case of *Kirk v. Clark* (c), a father surrendered his reversion in fee of copyhold lands, for the purpose of reducing the fine, and told the friends of his son's intended wife that the copyhold was so settled; and this formed a part of the consideration on which the marriage was had and the wife's marriage portion paid. In that case, Lord Chancellor Cooper said, "Though it (the surrender) were at first voluntary, yet upon his treaty of marriage it being regarded as the principal inducement thereto, it now became voluntary, and ought to be considered as if it had

(a) 1 Sid. 133.

(c) Pre. Ch. 275—278.

(b) 9 Ves. 195.

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but then been surrendered to the son (a).” The argument in that case was, that to take that view would defeat the statute of Elizabeth (c. 27); but that argument was not acted on by the Court (b). In *Tanner v. Byns* (c), a grant of an annuity expressed to be for natural love and affection, was allowed to be proved in consideration of marriage, so as to entitle her to rank as a specialty creditor of the grantee. *Crofton v. Ormsby* (d), *Martyn v. M’Namara* (e), and *Ashley v. Ashley* (f), were also cited.

In *Meggison v. Foster* (g), a voluntary bond, on faith of which a marriage took place, was held to be a valuable security.

Secondly, it is clear that whatever might be the defect in the instrument *per se*, this Court, when it finds other persons have given valuable consideration on the faith of representations as to the bond, will enforce it as a valid contract.

Mr. *Malins* and Mr. *Schomberg*, for the plaintiff.

The settlement of property stands on a different footing from the settlement of a mere promise. In *Kirk v. Clark* (h), copyhold property was settled; and in *George v. Milbanke* (i), the thing assigned was the money which had been raised. In *Ashley v. Ashley* (k), the thing assigned was the policy. Whereas here, the subject matter of the settlement is a mere voluntary obligation. The cases cited, therefore, have no application.

(a) Pre. Ch. 278.

(b) There was probably in that case a cross-bill filed by a creditor, as the Lord Chancellor directed the bill to be dismissed with costs, which seems irreconcilable with the reasoning; as the bill is stated in the report to be filed by the *cestui que trust* to establish the articles.

(c) 1 Sim. 160.

(d) 2 Sch. & L. 583.

(e) 4 Dr. & War. 411.

(f) 3 Sim. 149.

(g) 2 Y. & C. C. C. 336.

(h) Pre. Ch. 275.

(i) 9 Ves. 195.

(k) 3 Sim. 149.

The same observation applies to the case of *Meggison v. Forster* (a), where the deeds were actually deposited.

In *Maunsell v. White* (b), where a marriage took place on the faith of a will made by the uncle of the intended husband, who was one of the trustees, but who subsequently altered his will, it was held that the devisee of the uncle was not bound by the implied contract.

The East India Company v. Clavell (c), was also cited. (d)

Mr. *Fooks* appeared for the trustees, and supported the case of the plaintiffs.

The VICE-CHANCELLOR:—

There is no doubt that the bond, when in the hands of the son, or of the trustees for the son, who were the original obligees, was a mere voluntary obligation. The persons who now claim are neither the son nor the trustees for the son. Upon the occasion of the marriage the bond was dealt with as a provision for the lady whom the son married, and the question is, whether the trustees of that settlement are to be considered as volunteers.

The case is governed by authority. As against the assets of the father the trustees of the settlement cannot be treated as mere volunteers. The case of *George v. Milbanke* was decided by Lord Eldon, after mature consideration and on an examination of the authorities. He finally came to this conclusion—that an obligation, which was voluntary as regards the person in whose favour it was originally created, may cease to be voluntary when it

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| (a) 2 Y. & C. C. C. 336. | tlement on a daughter (after a |
| (b) 4 Ho. Lds. Ca. 1039. | bond, &c.) made good by matter |
| (c) Pre. Ch. 377; Gilb. 37. | <i>ex post facto</i> .—See 2 Ch. Rep. |
| (d) The marginal note in Gilbert | 265; 1 Vern. 464; 1 Ch. Cas. 59, |
| is as follows:—"3d May, 1714. | 103, 170, and 216, which seem |
| J. G. in court.—A voluntary set- | <i>contra</i> ." |

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passes into the hands of other persons who have given a valuable consideration for it.

Lord Eldon, in that case (*a*), states the law in this way: — “If the doctrine is rightly collected from the authorities, it imports all this—that if a man is indebted, and makes a provision for his child by a pure voluntary settlement, and that child afterwards marries, the circumstance of its leading to the marriage makes the settlement good as against the creditors, though it would have been bad if no marriage had taken place. I doubt whether it will not be found, in the circumstances of that case, that the child was not a pure volunteer. If it can be supported, as here stated, it goes a great way to decide this case; for though this is the case of a stranger, there is no difference between a voluntary settlement made good by a subsequent marriage and one made good by a subsequent advance of money.”

Whether the settlement is by grant or obligation, the same principle must apply. Part of the argument in support of the certificate went upon the distinction between a voluntary grant and a voluntary obligation. No doubt there is a difference, because in the case of a voluntary grant, the grantee has an estate actually vested in him, and has the subject matter in dispute in his own possession; whereas the holder of an obligation has not the possession, but only a right of action. But on the question, whether valuable consideration can be imported into the transaction or not, there is, in principle, no difference at all. Accordingly, Lord Eldon does not apply his observations exclusively to the case of a grant or conveyance. His language, treating of the effect of a subsequent transaction for value, as importing a consideration for value into the original grant, or obligation, as binding the original obligor or grantor, describes him as being bound by the subsequent transaction.

(*a*) 9 Ves. 193.

In this case it is not the original obligee who claims as a creditor, but the trustee for the wife who married upon the faith of the provision made by this bond, and who, marrying upon the faith of that provision, gave as much a valuable consideration as if money had been paid. It is on behalf of that daughter and her children, and all the *cestuis que trust* of that marriage, which is supported by valuable consideration, that the claim is now made; and I know of no principle and no authority upon which it can be held that the trustees of this lady, who married upon the faith of this obligation, can be treated as volunteers, when they claim as against the assets of the obligor.

As to the other part of the case—the representations made by the father—Lord Eldon thus deals with that circumstance. At p. 195, his Lordship, after referring to the case in *Siderfin*, says, that the substantial justice of the case is nearly the same where an instrument of this kind is carried to a man, who upon the authority of it advances his money, and where he advanced a sum of money at the time the appointment was made, the intention being declared at the time that the feoffee should assign—*i. e.* where an instrument of a voluntary kind is carried to a man, who upon the faith of it advances his money, in that man's hands it is no longer in the hands of a volunteer.

Upon the whole of this case, therefore, there are two grounds on which the claim of the trustees of the marriage settlement as specialty creditors on this bond must prevail. In the first place the valuable consideration of marriage for the transfer of the bond puts them on a higher footing than volunteers. In the next place the marriage was contracted on the faith of the representations of the obligor, that this bond was the provision which he made for his son. According to the law of this Court, if the obligor in a voluntary bond stands by and sees another person purchase the bond for valuable consideration, and

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says he will pay the bond, the purchaser becomes entitled to enforce payment against the obligor, or his assets, not as a volunteer, but as a creditor for value.

As a valuable consideration, marriage stands highest. And if the purchaser for valuable consideration of a voluntary bond becomes a specialty creditor for value of the obligor, much more ought the trustees of this lady, who took a transfer of the bond in consideration of marriage, to stand as specialty creditors for value as against the assets of the obligor.



July 10.

GARDNER *v.* GARDNER.

Money given without the intervention of trustees, to the separate use of a married woman and received by the husband from the executor, is impressed with the trust for separate use; but where the husband employed the money in business, and for his family expenditure, with the knowledge and assent of the wife, the Court refused to charge his estate with the amount so received.

THIS was a special case under the 13 & 14 Vic. c. 35.

John Watkins, by his will dated the 9th of December, 1833, gave to his daughter, Mary Watkins, 2000*l.* for her own sole use and benefit, independent of her husband; and the said testator declared that her receipt alone, notwithstanding her coverture, should be a good and sufficient discharge for the same to his executors.

The testator died on the 25th of November, 1837, and his will and codicil were duly proved by J. G. Watkins and W. Watkins.

The only settlement made on the marriage of Mary Watkins, dated the 6th of September, did not comprise after-acquired property.

By a codicil to the will the testator revoked the gift of 2000*l.* to his daughter, and gave in lieu thereof 1000*l.* for her own sole use and benefit, independent of her husband; with a direction that her receipt alone, notwithstanding her

coverture, should be a good and sufficient discharge for the same to his executors.

The testator died on the 25th of November, 1837, and his will was proved by his executors; and on the 13th of February, 1838, the executors paid to Mrs. Gardner the 1000*l.* and 9*l.* interest.

On such payment being made, Mrs. Gardner executed a release to the executors, by deed poll, which Thomas Gardner also executed to testify his privity and consent thereto.

The eighth paragraph of the special case was as follows:—

“ 8. The said sum of 1009*l.*, immediately after such payment, came to the hands of the said Thomas Gardner, and was paid by him to his account with Messrs. Berwick & Co., of Worcester, bankers; and the said Thomas Gardner mixed the same with his own monies, and employed the same in his business and family expenditure, and made no separate investment of the same, or of any part thereof.

“ 9. There is no evidence to show in what manner or under what circumstances the 1009*l.* came to the hands of the said Thomas Gardner, or was paid by him to the bankers, or was afterwards dealt with by him in manner aforesaid, save that the plaintiff does not deny that the same came to the hands of the said Thomas Gardner, and was paid by him to his bankers, and dealt with by him in manner aforesaid, with her knowledge and assent.

“ 10. There is no evidence to show whether, in giving such assent, the plaintiff intended that the 1009*l.*, or any part thereof should be a gift from her to the said Thomas Gardner, or otherwise that the same or any part thereof should be held by the said Thomas Gardner in trust for the plaintiff, for her separate use, or how otherwise. No communication ever took place between the said Thomas Gardner and the plaintiff subsequent to the payment of

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the money to the said Messrs. Berwick & Co., in any way touching the said 1009*l.*, or any part thereof."

Thomas Gardner died intestate and without issue, on the 3d of January, 1858, and letters of administration were granted of his estate to his widow the plaintiff.

The question submitted to the Court was, whether the plaintiff was entitled to retain out of the assets of Thomas Gardner the sum of 1000*l.* with interest at 4*l.* per cent. from the date of his decease, on the ground that he was a trustee for her of the sum of 1000*l.*

Argument.

Mr. *Archibald Smith*, for the plaintiff.

It is admitted that 1000*l.* given to the separate use of the plaintiff was received by the husband, and retained by him. The husband executed the deed of release, and must therefore have known the character of the gift, and the money was in his hands, impressed with the trust for separate use. In *Rich v. Cockell* (a), Lord Eldon uses these words (b): "As at the time the legacy was given it was for the separate use of the wife, and it continued so until transferred to the husband, that transfer would not destroy the separate trust, unless clear evidence is produced by the husband that it was intended with her assent to destroy it. If the evidence is short of that, as it is perfectly settled that a husband may in this court be a trustee for the separate use of his wife, he would be precisely in the same situation as to the beneficial interest as the person who made the transfer; therefore, he is a trustee." In this case there was no evidence to show more than that the money had been received by the husband with the knowledge and assent of the wife. In *Rowe v. Rowe* (c), under similar circumstances, the Court held the right to separate use was not lost.

Mr. *Welford*, for the defendants (the next of kin of the trust).

(a) 9 Ves. 369.

(b) Ibid. 375.

(c) 2 De G. & S. 294.

In *Rich v. Cockell* (a), the trustee of the fund imprudently paid it to the husband, and the Court held that the husband must be regarded as a trustee, unless there were evidence to show that the wife had consented to destroy the trust for her separate use. In *Rowe v. Rowe* (b), it was a question of evidence, and the Court thought there was nothing to show the wife intended to give the legacy to her husband. In *Caton v. Rideout* (c), where the husband was actually one of the wife's trustees, and applied the dividends to his own use with the assent of the wife, Lord Cottenham said, the separate money of the wife paid to the husband with her concurrence, or by her direct authority, to be inferred from their mode of dealing, cannot be recalled. In *Darkin v. Darkin* (d), the husband in the books kept by him treated the amount as the separate property of the wife; but the decision in *Caton v. Rideout*, was recognised. In a late case of *Rowley v. Unwin* (e), Vice-Chancellor Wood observed (f), that the income of a wife's separate property which a husband receives while his wife is living with him, cannot be recalled.

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Mr. A. Smith, in reply.—Here there was nothing to show that any gift was intended. In *Rich v. Cockell*, Lord Eldon decided it on the ground that there was not sufficient evidence of gift. *Caton v. Rideout* was a case of income; and *Darkin v. Darkin* was really in the plaintiff's favour, because each separate signature kept alive the right.

The VICE-CHANCELLOR:—

Judgment.

The principle involved in this case is clearly stated by Lord Eldon in *Rich v. Cockell*. If a sum of money is

(a) 9 Ves. 369:

(d) 17 Beav. 578.

(b) 2 De G. & S. 294.

(e) 2 K. & J. 138.

(c) 1 Mac. & G. 599.

(f) Ibid. 141.

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given to the separate use of a wife as a capital sum, without the intervention of trustees, the payment of that sum to the husband makes him a trustee, and he is bound to hold it to the separate use of his wife. In that case, Lord Eldon decided that the mere transfer of the fund to the husband did not destroy the trust for the separate use of the wife; or, in other words, by receiving the fund the husband becomes guardian and trustee of it for the separate use of his wife. But at the same time, Lord Eldon said what is perfectly obvious, that where there is sufficient evidence to show an intention on the part of the wife that the husband should employ the money for his own use or for the family expenditure, as he might think proper, the assent of the wife to such application of the money must put an end to the trust for her separate use.

The only question in this case is, as to what amount of evidence is necessary in order to put an end to the trust for the separate use of the wife. The money reached the husband's hands, impressed with that trust for the separate use which was created by the testator. But after the husband had received it he employed it partly in his business and partly in family expenditure, with the knowledge and assent of his wife. But the case then proceeds to state, in paragraph 10, "That there is no evidence to show whether in giving such assent the plaintiff intended the 1000*l.* should be a gift from her to her husband." This is not a case of gift at all. The case is, that the husband, holding the money upon trust for the separate use of his wife, or as she should direct, employed it for their common benefit; and the question is, whether after this has been done with the knowledge and assent of the wife, she is entitled to recover the money from her husband's estate just as if it had remained in his hands unaffected by any act done or permitted by her to determine the trust for her separate use.

I am of opinion that the employment of the money by the husband, partly in business, partly in expenditure for

the benefit of the family, with the knowledge and assent of the wife, has put an end to the trust for her separate use, and that the plaintiff is not entitled to charge her husband's estate with the amount of the fund.

The case must be answered accordingly.

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GREENWAY v. GREENWAY.

Nov. 17 & 18,
1858; and
Feb. 10, 1859.

TWO bills had been filed in this case for the administration of the estate of George Sullivan Greenway, one by his brother Edward Kelynge Greenway against Charles Thomas Greenway, also a brother of the testator, and Isabella Margaret Thomas and her husband, E. B. Thomas, and Isabella Woodcock. The second suit was by Charles Thomas Greenway against the plaintiff in the first suit, Edward Kelynge Greenway.

Both suits came on together for hearing.

George Sullivan Greenway, by his will dated the 1st of March, 1850, gave and devised as follows:—

“ I, George Sullivan Greenway, of the Madras Civil Service, do hereby make this my last will and testament.

“ First, I do hereby cancel and revoke all former wills whensoever executed by me.

“ Secondly, I do hereby bequeath all my property real and personal, of whatsoever nature or description, and wheresoever situate (whether land at Heidelberg, Port Phillip, in New South Wales, or in the Jaffna Peninsula of the Island of Ceylon, or funds in the hands of Messrs.

A testator gave his real and personal estate in trust as to the annual income for his brothers E. and C., or the heirs of their bodies, and if either shall die leaving heirs of his body, his share shall go to such heirs; but if one die without issue, then the whole income shall go to the survivor, or in case of his death, to his heirs. But in case both shall die without issue, then the whole property to be divided equally among his next of kin. —*Held*, the gift over, valid. The object of the 29th section of the Wills Act, 1 Vic. c.

26, is to redress the inconvenience arising from the words “dying without issue,” and similar words, having acquired a legal meaning different from the popular meaning.

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“ Allan, Deffell, & Co., of Calcutta, or of Messrs. Arbuthnot & Co., of Madras, or of Mr. Kelynge Greenway, of Warwick, in England, or elsewhere), to the members constituting the firm of Messrs. Arbuthnot & Co., of Madras.

“ In trust for the benefit in equal portions to the extent of the annual income of my property of my brothers Edward Kelynge Greenway and Charles Thomas Greenway, or the heirs of their bodies lawfully begotten, and the meaning of this my will is, that if either brother shall die, *leaving* lawfully begotten heirs of his body, then shall the share or portion of such brother descend to such lawfully begotten heirs; but if one brother shall die without lawful issue, then shall the whole annual income be paid to the surviving brother, or in case of his death also to his lawfully begotten heirs; but in case both brothers shall demise without issue lawfully begotten, then shall the whole property be divided equally amongst my nearest of kin; and I direct and desire that my god-daughter Isabella, daughter of E. H. Woodcock, formerly of the Madras Civil Service, Esq., be allowed and do come in as a co-sharer on the same footing with my nearest of kin.

“ And I do hereby nominate and appoint Wm. Mac Taggart, Esq., and Wm. Urquhart Arbuthnot, Esq., both of Madras, executors of this my will, with power to nominate and appoint other executors as to them may seem fit, also with full power to get in, collect, and receive all monies or securities for money, and to sell dispose of, and convert into money all other my real and personal estate, either by public auction or private contract, as to my said executors shall seem meet.

“ And I do hereby declare that my executors and the survivor of them, and the executors and administrators of such survivor, shall and may at all times out of the first monies that may come to either of their hands,

“ retain and indemnify themselves and himself respectively all such costs, damages, and expenses as they or either of them may be put unto or sustain in and about the execution of the trusts of this my will, and that neither of them shall be responsible for any loss that may happen to the said trust premises, unless the same shall have been occasioned by their own wilful neglect or default, neither shall the one be answerable for the other nor for more monies than shall actually come into his hands by virtue of this my will. And hereby revoking and making void all former wills by me at any time heretofore made, I declare this to be my last will and testament. In witness whereof I the said George Sullivan Greenway have hereunto set my hand and seal at Tanquerbar, in the East Indies, this first day of March, 1850.”

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GREENWAY
v.
GREENWAY.
Statement.

The executor William MacTaggart died in the lifetime of the testator.

The testator died on the 10th of March, 1857, leaving Edward Kelynge Greenway his heir-at-law, and Charles Thomas Greenway, Edward Kelynge Greenway, and Isabella Margaret Thomas, his sole next of kin.

Isabella Woodcock also survived the testator, and was a defendant to the first suit.

The executors and trustees named in the testator's will disclaimed.

On the 12th of July, 1858, Edward Kelynge Greenway obtained letters of administration of the testator's estate.

On the 10th of June, 1858, Edward Kelynge Greenway executed a disentailing deed.

The testator, at his death, possessed personal estate in India and in England, and was seised of freehold estate in Ceylon, and at Heidelberg, in New South Wales.

The only question for the decision of the Court was, whether the gift over of the personal estate to the next of kin was too remote, as depending on an indefinite failure of issue.

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GREENWAY
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GREENWAY.
—
Argument.

Mr. *Bacon* and Mr. *Steere*, for the plaintiff in the first suit—

Mr. *Malins* and Mr. *Cole*, for the plaintiff in the second suit—

Supported the same construction of the will.

They contended that the real and personal estate of the testator being blended together, an estate tail was created as to the real estate; and that as to the personalty, it was absolutely vested in the plaintiffs at the testator's death.

That the true construction was, that the gift over was intended merely to take effect in the event of either of his brothers dying in the lifetime of the testator: *Gee v. The Mayor of Manchester* (a); and that, both the brothers having survived the testator, the gift over never took effect.

Ware v. Watson (b); *Campbell v. Harding* (c); *Barlow v. Salter* (d); and *Forth v. Chapman* (e), were also cited.

Mr. *Mackeson*, for Mrs. Thomas—

Mr. *Wm. Pearson*, for Miss Woodcock—

Mr. *Giffard*, for Mr. Thomas—

Contended, that upon the whole will it was quite clear the testator never intended a general failure of issue, because the will distinctly referred to the failure of issue at the death of the brother; as the direction was, that the whole income should be paid to the surviving brother. It was submitted, therefore, that even before the late Act the words "dying without issue" would not be construed as meaning an indefinite failure of issue:

Parkin v. Knight (f); *Roe v. Jeffery* (g); *Forth v. Chapman* (h); *Harris v. Davis* (i).

(a) 17 Q. B. 737.

(b) 7 De G. M. & G. 248.

(c) 2 R. & M. 390; s. c. under title of *Candy v. Campbell*, 8 Bligh, N. S. 649, and 2 Cl. & F. 421.

(d) 17 Ves. 482.

(e) 1 P. Wms. 663.

(f) 15 Sim. 83.

(g) 7 T. R. 589.

(h) 1 P. Wms. 663.

(i) 1 Coll. 416.

But the late Wills Act virtually decided the question; it could not be pretended that there was any intention apparent on this will to make the gift dependent on a general failure of issue; and if so, the language of the Act was decisive.

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GREENWAY
v.
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Argument.

Lachlan v. Reynolds (a) was also cited.

Mr. *Malins* in reply.

The 29th section of the Wills Act has no application where, as here, there was a clear intention to create an estate tail.

The VICE-CHANCELLOR:—

Judgment.

This case was argued upon the 29th section of the late Wills Act.

The testator disposes of his estate both real and personal in the same clause. But the only question is as to the personalty.

He directs that in case both his brothers should die without issue, lawfully begotten, the whole of his property should be equally divided among his nearest of kin including *Isabella Woodcock*.

(a) 9 Hare, 796.

NOTE.—Subjoined is the 29th section of the 1st Vic. c. 26:—

“And be it further enacted, that in any devise or bequest of real or personal estate, the words ‘die without issue,’ or ‘die without leaving issue,’ or ‘have no issue,’ or any other words which may import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime, or at the time of the death of such person; and not an indefinite failure of his issue, unless

a contrary intention shall appear by the will by reason of such person having a prior estate tail, or of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise: Provided that this Act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age, or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.”

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 v.
 GREENWAY.
 —
Judgment.

It has been argued that this gift over to the nearest of kin is too remote, as depending on an indefinite failure of issue.

The rule prescribed by the 29th section of the statute is, that the words "die without issue" must be construed to mean not an indefinite failure of issue, but a failure of issue living at the death.

The express exceptions and proviso which are mentioned in the latter part of the section, are intended to define the cases in which an intention contrary to this rule may appear by the will. But these exceptions do not seem to touch the present case.

It is, however, proper to consider whether any intention contrary to the restricted construction of the words can be gathered from the testator's language in the antecedent limitations.

He gives the whole of his real and personal estate to trustees, and the trusts are declared in these words:—

"In trust for the benefit in equal portions to the extent of the annual income of my property of my brothers Edward and Charles, or the heirs of their bodies lawfully begotten, and the meaning of this my will is, that if either brother shall die leaving lawfully begotten heirs of his body, then shall the share or portion of such brother descend to such lawfully begotten heirs, but if one brother shall die without lawful issue, then shall the whole annual income be paid to the surviving brother, or in case of his death also, to his lawfully begotten heirs. But in case both brothers shall demise without issue lawfully begotten, then shall the whole property be divided equally among my nearest of kin."

The words "if either brother shall die leaving lawfully begotten heirs of his body," certainly refer to the event of a failure of issue at the death of either brother, and not at any more remote period.

So also the words "if one brother shall die without

lawful issue, then shall the whole income be paid to the surviving brother," cannot mean an indefinite failure of issue.

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Therefore when he immediately afterwards says that "in case both brothers shall demise without issue lawfully begotten, then shall the whole property be divided equally amongst my nearest of kin," even without the rule enacted by the late statute, there are authorities for construing these latter words by reference to the preceding words, as meaning not an indefinite failure of issue, but a failure of issue at the time of the death of both the brothers.

In the case of *Radford v. Radford*(a), the question was, whether a gift over in case both the testator's nephews should happen to die without issue was too remote, as being limited to take effect on an indefinite failure of issue. And upon the authorities it must have been held that these words, taken by themselves, imported an indefinite failure of issue. But because in the prior limitations there were the words "without leaving issue," and the testator had said that if either of the nephews should die "without leaving issue of his body" the survivor should take, the Court held that the generality of the words "die without issue" ought to be restrained by reference to the previous words which authorized the construction of a failure of issue at the time of the death.

Lord Hardwicke, too, acted on the same principle in the case of *Shepherd v. Lessingham*(b). He said:—

"I consider in general that a limitation of a personalty after a dying without issue is void. But the Court will put a construction on those words, and support the limitation over if possible."

Therefore, where the gift over was, in case children "should die without issue," and upon these words taken by themselves would be invalid, yet because he found in the

(a) 1 Keen, 486.

(b) Amb. 122.

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v.
GREENWAY.
—
Judgment.

gift of the other moiety the words "without leaving issue," that great judge thought himself authorized to restrict the generality of the former words by reference to the latter, and held that the gift over was valid.

The object of the 29th section of the late Wills Act is to redress the inconvenience which had arisen from the words "dying without issue," and other similar words, having acquired a legal meaning different from the popular meaning.

If, in the cases to which I have referred, the Courts went so far in struggling to avoid this inconvenience, it is still more proper now to adopt the construction most compatible with the rule and spirit of the statute, and not to endeavour to extend the exceptions. Indeed, it is to be hoped that the context of wills will seldom now afford grounds for departing from the general rule which the statute presents.

In the present case it was argued that the words of the previous limitations gave express estates tail to the brothers in the real estate, and that therefore they must be held to take absolute interests in the personalty. But in the case of *Radford v. Radford* express estates tail were given, and the question was very strongly argued by Mr. Preston on that ground. Nevertheless the words "die without issue" were there, by reference to the context, construed in the restricted sense, and held not to mean an indefinite failure of issue.

Upon the whole, therefore, the present case seems to be governed by the rule laid down in the statute, and the gift over of the personalty to the nearest of kin, including Isabella Woodcock, must be declared to be a valid gift.

1859.

HODGSON v. CLARKE.

July 29th.

JOHAN CLARKE, by his will, dated the 1st of September, 1828, after giving certain specific and pecuniary legacies, gave, devised, and bequeathed all the residue of his estate and effects unto his trustees and executors thereafter named, viz., his wife Alice Clarke, Richard Buller, Thomas Case, and James Lowe, their heirs, executors, administrators, and assigns, according to the nature thereof respectively, upon trust from time to time to sell and convert into money such parts of his said estate as his trustees and executors for the time being should see fit, and all the monies to arise therefrom, and all monies which should form part of his estate at his decease, upon trust, to invest the same in Government security, or sufficient mortgage, on one of which securities he directed that all sums thereafter required to be invested should be placed; and as to all the said trust, estate, and effects, upon trust, to pay the rents dividends, and annual produce thereof as the same should be received, unto his said wife during her life, and from and after her decease, upon trust to convert into money the whole of his estate and effects which should not then consist of money; and as to the whole of the monies then constituting his estate, upon trust (among other trusts not material to the present question) to invest 4000*l.* and to pay the interest and dividends thereof to his brother James Clarke during his life, and from and after his decease “upon trust to pay or divide the principal sum unto or equally between the child or children of his said brother living at his decease (except Thomas, his eldest son), and the issue then living of any (except the said Thomas) then dead, such issue taking their parent’s share only.”

Where a testator gave 4000*l.* to trustees on trust to pay the income to J. for life, and after his decease to divide the principal equally between the child and children of J. living at his death (except Thomas his eldest son), and the issue then living of any (except the said Thomas) then dead; though it appeared that the eldest son was otherwise provided for, and that Thomas was the youngest son—*Held*, the exception void for uncertainty.

1859.
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 v.
 CLARKE.
 —
Statement.

The testator then appointed his trustees, his executrix and executors, and died on the 15th of March, 1829; his will was proved by all but one of the executors.

James Clarke, the brother, died in 1845, leaving four children living, of whom Robert Addison Clarke was the eldest son, who under the will of his maternal grandfather, was entitled to 2000*l.* a year, which circumstance, it appeared from the evidence, was well known to the testator.

Thomas Clarke, described as the eldest, was in fact the youngest son of James Clarke, and was unprovided for, nor was there any known reason why he should have been excluded by the testator from the benefit given by the will.

The understanding of the family was, that the property given by the testator would be divisible among the three children of James Clarke, exclusively of the eldest son, Robert Addison Clarke; and the will of James Clarke, the testator's brother, contained the following passage:—

“And I do hereby inform my said son James, and my daughter Jane, and also Thomas my youngest son, that the sum of 4000*l.* after my decease, and that of my sister-in-law the widow of my brother John, is divisible among them my said children James, Jane and Thomas, in equal shares.”

The cause came on to be heard on the 26th of June, 1856, and certain inquiries were directed, but the construction of this gift was not argued. Thomas Clarke now presented this petition, asking for payment to him of one-third of the fund given among the four children of James, on the ground that the eldest son was not entitled to participate in such gift.

Argument.
 —

Mr. *Birkbeck* for Thomas, contended that the fund was divisible among the three sons of the testator's brother, omitting the eldest son. The mistake was either in the name or in the description. It was a mistake disclosed only by evidence, and might therefore be removed by

evidence. It appeared from the evidence that the eldest son was amply provided for within the knowledge of the testator; that there was no known reason why Thomas should be excluded; and that it was the understanding of the family that it was the eldest son who was intended to be excluded, and this Court would therefore presume that the mistake was in the name and not in the description. In *Bradshaw v. Bradshaw* (a), which was very like this case, where the testator devised certain estates to Robert, the second son of E. B., whose second son was named Henry, the Court held that there was a mistake in the name and not in the description, and declared Henry entitled.

Mr. *Malins*, Mr. *Jessell*, Mr. *Bacon*, Mr. *Little*, and Mr. *Green*, appeared for different parties.

The VICE-CHANCELLOR:—

There is too much uncertainty for the Court to presume one way or the other, and I must declare the exception void for uncertainty.

(a) 2 Y. & C. 72.

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HODGSON .
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Argument.

Judgment.

1850.

July 18.

THIEDEMANN v. GOLDSCHMIDT.

1. Indorsees for value of a bill of exchange, accepted on the credit of a bill of lading produced by the indorsees, which, unknown to them, was a forgery, restrained from enforcing payment against the acceptor.

2. The acceptance of bills of exchange transmitted for acceptance, accompanied by a bill of lading, is a complex contract, the basis of which is the genuine character of the bill of lading.

Semble—
The transmission of bills of exchange for acceptance, together with a bill of lading, amounts to a representation that the bill of lading is authentic.

THIS was a motion for a decree. The bill stated the facts as follows:—The plaintiff, C. R. F. Thiedemann, is a corn-factor at Newcastle. The defendants S. H. Goldschmidt and H. L. Bischoffsheim are merchants, carrying on business at 10, Angel Court, Throgmorton Street, under the firm of “Bischoffsheim & Goldschmidt,” and are the London agents of a company at Berlin, called “The Berlin Discount Company.”

The defendant Otto Friedrich Homeyer carried on business at Wolgast, in Prussia, and on the 9th of June, 1858, Homeyer wrote to the plaintiff, proposing to consign a cargo of wheat to the plaintiff, and asking for how much and at what date the plaintiff would open for him a credit in London. To this letter the plaintiff replied on the 12th of June, 1858, as follows:—

“In answer to your favour of the 9th, you may draw against transmittal of bill of lading 30. to 32. per quarter in advance for your best yellow wheat on our account, at fourteen days, one, two, or three months’ date, on the Union Bank of London. Insurance we can effect you at Lloyd’s, at half per cent. premium *in toto*, or you must send us along with the bill of lading the policy of insurance if effected there. The value of your wheat to-day is 47. per quarter, 63lbs., &c. &c.”

On the 26th of June, 1858, the defendant Homeyer wrote to the plaintiff as follows:—

“In answer to your favour of the 12th, I have made up my mind to consign to you the 8320 sheffels (being about 1500 quarters) wheat shipped by the vessel *Anna*, Captain Kell, for which I annex duplicate bill of lading. At the same time, I take the liberty to make use of your kindness,

and to draw 2400*l.* for your account to the Union Bank of London, at two months' date, requesting you to provide due protection to those drafts."

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—
Statement.

Annexed to the letter was a paper, purporting to be a duplicate or copy of the bill of lading referred to in the letter, and being in fact a copy of the document delivered at the Union Bank as a genuine bill of lading of the 8320 sheffels of wheat. On the same day the defendant Homeyer wrote to the plaintiff as follows:—

"For account of Messrs. R. Thiedemann & Co., in Newcastle, I have taken the liberty to value upon you

400 <i>l.</i>	}	In firsts and seconds to my own order at two months' date,
400		
400		
400		
400		
400		

and I beg you will give prompt protection for account of said friends."

On the 30th of June, 1858, the plaintiff, relying on the *bona fides* of the transaction, and in full confidence that a true and proper bill of lading of the 8320 sheffels of wheat would be delivered to the Union Bank previously to the said bills being accepted on behalf of the plaintiff, addressed an order to his bankers, Wood, Parker, & Co., of Newcastle, requesting them to ask the Union Bank of London to accept the drafts of Mr. Otto Fr. Homeyer for 2400*l.*, against properly indorsed bill of lading of 8320 sheffels of wheat, per *Anna*, J. Kell, master, on account of plaintiff's firm. Messrs. Wood & Co. forthwith instructed the Union Bank to accept the said drafts on receiving the said bill of lading in accordance with the terms of the last-mentioned letter.

On the 30th of June, 1858, the defendants Goldschmidt, Homeyer, and Bischoffsheim, presented to the Union Bank for acceptance, on account of the plaintiff, six bills of ex-

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change for 400*l.* each, drawn by Homeyer, payable at two months after date to his order, and at the same time presented to and left with the Union Bank, a paper writing, purporting, and which they represented to be a genuine bill of lading of 8320 sheffels of wheat shipped by Homeyer on board the *Anna*, Captain Kell, to the order of Homeyer, and which, as translated, was as follows:—

“ *Wolgast, June 26, 1858.*

“ I, F. Kell, of Wolgast, captain of the vessel *Anna*, now loading in Wolgast, and bound for Newcastle, acknowledge having received on board the said vessel, from Mr. Otto Fr. Homeyer, well and good conditioned, 8320 sheffels of good sound wheat, and 350 mats, in order to deliver the same after completed voyage to his order, on paying freight of 1*s.* 6*d.* per delivered imperial quarter of wheat, average according to custom. For the fulfilment of this I pledge my person, goods, and the vessel, with all apparel, for which I have signed four bills of lading of same tenor, only good for one.

“ F. KELL.”

On the 1st of July, 1858, the Union Bank, relying on there presentation that the paper writing was a genuine bill of lading, accepted the six bills on account of the plaintiff.

On the 12th of July the plaintiff discovered that the bill of lading was a forgery, and that no wheat had been shipped on board the *Anna*, but that that vessel had sailed from Wolgast in ballast and without cargo to Dantzic.

On the following day the plaintiff came to London, and with his solicitor went to the office of the defendants Goldschmidt and Bischoffsheim, and informed them that the bill of lading left at the Union Bank was a forgery. The plaintiff further required to know whether the defendants still had possession of the bills so accepted by the bank. The defendants answered that the bills were still in their possession, whereupon the plaintiff demanded

the bills, and offered to return the pretended bill of lading; but the defendants refused to give up the former or accept the latter, and the plaintiff then required the defendants not to part with the six bills to any person whomsoever. The defendants, however, replied that they should deliver the said accepted bills to any person who might hold the seconds^(a) of the said bills properly indorsed; that they had received the six bills and the bill of lading from a correspondent abroad, and that it was no affair of their house.

The defendants alleged that they or their correspondents, the Berlin Discount Company (whom they altogether represented), had given good and valid consideration for the said bills, and were, in fact, purchasers of the same without notice of any fraud, or of the said forgery; and alleged that on the 28th of June, 1858, and on the faith and credit of the said bills, they the said Berlin Discount Company remitted to a firm at Stettin 4800 thalers (740*l.*), who thereout took up acceptances of Homeyer's to the amount of 3000 thalers (460*l.*), and carried a sum of 1800 thalers (280*l.*) to the credit of Homeyer, who was at that time largely indebted to the Stettin firm. They also alleged that the said Berlin Discount Company, on the same or the following day, remitted a sum of 6000 thalers (920*l.*) to Homeyer in cash to Wolgast, and had since made payments to him of 3000 thalers (460*l.*), all which payments amounted in the whole to 2120*l.* or thereabouts.

The plaintiff filed the present bill against Goldschmidt and Bischoffsheim, and against the Berlin Discount Com-

(a) Foreign bills are often drawn in parts, all the parts making together what is called a set.

Exemplars or parts of the bill are made on separate pieces of paper, each part being numbered and referring to the other parts. Each part contains a condition that it shall continue payable only so long as the others remain

unpaid. These parts should circulate together, or one may be forwarded for acceptance while the other is delivered to the indorsee, thus relieving him from the necessity of forwarding his part for acceptance, but giving him the indorser's security immediately, and diminishing the chances of losing the bill.

Byles on Bills (7th edit.), 340.

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pany when within the jurisdiction, alleging that the Berlin Discount Company had for some time previously acted as the bankers and agents of Homeyer, and that they made him the above advances on his own credit, and not on the security of the alleged bill of lading. The plaintiff also charged that the defendants Goldschmidt and Bischoffsheim were each aware that Homeyer had no authority to draw the said bills except as against the produce, and on the security of a good and valid bill of lading; that the acceptance of the plaintiff was to be conditional on receiving such good and valid bill of lading; that the Berlin Discount Company ought to have ascertained whether the wheat was shipped before they advanced the money; and that the defendants Goldschmidt and Bischoffsheim were in fact answerable for, and by their conduct warranted, the genuineness of the bill of lading.

The Berlin Discount Company held the seconds of the bills indorsed by Homeyer, and threatened to transmit them to the defendants Goldschmidt and Bischoffsheim to enforce payment. On the 4th of August, Homeyer was convicted of the forgery, and sentenced to eight years' penal servitude.

The bill prayed for a declaration that the bills of exchange were drawn without any proper authority; that the plaintiff's acceptance of the same was obtained by means of fraud, and that the same might be decreed to be delivered up to be cancelled; also for an injunction to restrain the defendants Goldschmidt and Bischoffsheim from negotiating the said bills of exchange, and to restrain the said defendants, and also the Berlin Discount Company, and their agents, from prosecuting any action or suit against the plaintiff, or the Union Bank, on the said bills of exchange.

Argument.

Mr. Bacon and Mr. Hetherington, for the plaintiff.

It was not necessary for the plaintiff, and he did not in fact impute fraud to the defendants. The simple

case before the Court was, whether they were to be allowed to recover at law on these bills which they had obtained from the plaintiff, innocently it might be, upon the representation that the bill of lading was genuine, but which turned out to be a forgery. Where one of two innocent parties must suffer, this Court would leave them to their legal remedies; but one of two innocent parties, who had, though unintentionally, been the means of deceiving the other, would not be permitted by this Court to take advantage of his error to the injury of that other.

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Argument.

Mr. *Malins* and Mr. *Ferrers*, for the defendants.

That both parties were deceived by Homeyer is indisputable, but in such case the Court would not interfere to the aid or prejudice of either.

This case was concluded by a decision of the Exchequer Chamber, affirming the judgment of the Court of Queen's Bench: *Robinson v. Reynolds (a)*. In that case an action was brought by the indorsee of a bill of exchange against the acceptors, which was precisely this case. The drawer had fraudulently indorsed to the plaintiff a fictitious bill of lading, and at the same time indorsed a bill of exchange to the plaintiff, who requested the bank to accept such bill, which they did. The defendant pleaded to the action that the drawer was in the habit of sending goods by carrier to Liverpool, to be delivered at the drawer's order, receiving a bill of lading of the goods; and that this instrument, by the custom of merchants, barred the property in the goods. The plea further alleged that the consideration had failed, but stopped short of averring that the plaintiff knew the bill of lading to be forged. Lord Chief Justice Tindal, in giving judgment, said, "The failure of consideration between the indorsees for value, and the acceptors, constitutes no defence; nor would the want of consideration *between the drawer and the acceptors*, unless they took the bill with the want of

(a) 2 Ad. & E. N. S. 190.

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 —
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consideration, which was not averred in this plea. . . .
 The acceptance binds the acceptors conclusively, as between them and every *bond fide* indorsee for value. And it matters not whether the bill was accepted before or after such an indorsement. Consistently with every averment in the plea, the bill may have been accepted *on the credit of the drawer*, or for his accommodation, and the indorsee would then unquestionably have a right to sue, having given full value for it."

This was precisely the same case, and must be governed by the same rule. It never entered into the contemplation of the defendant in that case, that the defence which could not be supported at law, stood in a different position in equity.

The principle which was contended for by the plaintiff in this case, would apply to every case where a defendant was sued on an accommodation bill. The state of the law was well known to commercial men; and if the plaintiff were to be released from his engagements on these bills, such a view of the law would be attended with great public inconvenience.

Price v. Neale (a), and *Byles on Bills*, 110, 154, were also cited.

Mr. *Bacon* replied.

Observations.

The VICE-CHANCELLOR, during the argument, made observations to the following effect:—

The case of *Robinson v. Reynolds* seems to have been decided entirely on the question of consideration, and on the doctrine well established at law—that want of consideration is no defence as between the indorsee and the acceptor.

In a case of this kind it would seem that upon the refusal of the plaintiff to pay, the right of the defendants is to get back the forged bill of lading, and to sue the drawer

(a) 3 Bur. 1355;

to whom they had paid the money. In any view of the case that would be the primary remedy. And on the question of convenience, surely, in the case of a foreign bill of exchange, to leave the acceptor, who was the person on whom the fraud was not directly or primarily practised, and who had not parted with his money, to sue the drawer in a foreign court in respect of a fraud committed directly against another person, would not be convenient. The plaintiff was no party to the transaction between the defendant and the fraudulent drawer, and it was only against the defendants that the fraud was completed to the extent of getting the money.

It is not easy to see why, in a case of this kind, the governing principle should not be, that between two innocent parties, the condition of the one who has not parted with his money is the best, and ought not to be disturbed. *In æquali jure potior est conditio possidentis.* (a)

But in this case, the nature of the transaction shows that the contract which the defendant procured the plaintiff to enter into by accepting the bills, was a contract to pay for the cargo. The transmission of the bills of lading along with the bills of exchange made the existence of the cargo the basis of the contract.

I have always understood that in this Court the non-existence of that which formed the basis of a contract and the consideration for the contract, is fatal; and that this Court could not sanction the performance of such a contract.

That the representation of the existence of the basis

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—
Observations.

(a) The case of the *East India Company v. Tritton*, 3 B. & C. 288, seems to have been decided on the ground that the acceptor had actually paid the indorsee before the defect in the power of attorney was discovered. One

ground of the decision in *Price v. Neale*, 1 Bla. 390, was, that even supposing no neglect on the part of him who had actually paid the money, the loss ought not to be shifted from one innocent man to another.

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was innocently made by one of the parties to the contract, cannot, at least in this court, make any difference or give any right to that party to enforce the contract against another equally innocent. (a)

Judgment.
 —

The VICE-CHANCELLOR:—

This plaintiff is suing in equity for relief which he says he cannot have at law; and the counsel for the defendants have satisfied me that at law he can have no relief.

The question is, whether he can have any relief in equity. The plaintiff in equity has entered into a contract upon a representation made originally by the drawer of certain bills of exchange, which were conveyed directly to the acceptor of the bills through the indorsees, who have given value for them. If the bills of exchange had come alone, the acceptor would be bound, on a contract which was simply a contract between him and the indorsees, without reference to any question between the drawer and the acceptor.

(a) "When there proves to be
 "an error in the thing or subject
 "for which he bargained, then
 "the business is null in itself by
 "the general rules of contracting,
 "inasmuch as in all bargains the
 "matter about which they are
 "concerned, and all the qualities
 "of it, ought to be clearly under-
 "stood, and without such full
 "knowledge the parties cannot
 "be supposed to yield a full
 "assent."—1 Fonbl. Treatise on
 Equity, p. 134.

"If the right of the party with
 "whom the contract is made
 "depends upon the adoption of
 "the facts of the person commit-
 "ting the fraud, it would appa-

"rently be sufficient to vitiate
 "the contract."—1 Evans' Pothier
 on Contracts, p. 20, note c.

In the same work the principle
 is stated in these terms, p. 21:—

"Equity ought to preside in
 "all agreements; hence it follows
 "that in contracts of mutual
 "interest, where one of the con-
 "tracting parties gives or does
 "something for the purpose of
 "receiving something else as a
 "price or compensation for it, an
 "injury suffered by one of the
 "contracting parties, even when
 "the other has not had recourse
 "to any artifice to deceive him,
 "is alone sufficient to render
 "such contracts vicious."

But the transaction is of a different character, because with the bills of exchange there was sent the bill of lading ; and the subject matter of the bill of lading became therefore incorporated in the transaction so as to constitute a complex contract, the effect of which is that the purchaser of what is represented by the bill of lading is asked to accept the bills as the price of a cargo, for which, if it existed, and only if it existed, he is bound to pay. There is no other reason why the bill of lading was sent. Payment for the cargo and the existence of the cargo, form an integral part of the contract. When, however, you find that there was no cargo and no bill of lading other than a forged one, the indorsees, who, without notice of the fraud, procured the acceptance upon a representation which has turned out to be untrue, can scarcely be permitted to enforce such a contract against the acceptor.

If they get an acceptance in that manner, I must consider that by the bill of lading having been sent along with the bills of exchange, the fraudulent representation and fraudulent circumstances were so far incorporated with the contract that, the fraud being discovered before the contract was fulfilled, this Court will not allow a contract of that kind to be enforced. The Court will decree that the person first deceived must get what relief he can ; but not by compelling the plaintiff to perform a contract into which he has entered, for he cannot in this court be said to have entered into any contract at all, inasmuch as the instrument purporting to represent the existence of that was the basis if the contract was forged and the basis had no existence.

This misrepresentation was a fraud, to which the defendants innocently made themselves parties. But though innocently deceived, they have, in this court, no right to enforce this executory contract against the plaintiff. However, I am fully sensible of the importance of this question, and of the difficulties surrounding it, and I dispose

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of it at once because the principles which ought to govern the decision are, to my understanding, perfectly settled. But if I am wrong, there ought to be no delay in having my views corrected if they are erroneous. Where the acceptance was obtained by means of fraud, so far as regards public policy one cannot help considering that if the Court were to adopt implicitly as the law of this Court what was decided in *Robinson v. Reynolds*, as to an inland bill, the public inconvenience would be very great.

The foreign indorsees of these bills of exchange had means of knowledge at the time which the domestic acceptor could not have had. They have also means of enforcing their remedy against the drawer when fraud upon them was the sole cause of their loss, which are not accessible to the plaintiff. The fraud in such cases would lie between the foreign indorsee and the foreign drawer; and if, upon arguments founded upon public policy, facilities are to be given to fraud being perpetrated between foreign drawers and foreign indorsees of bills of exchange, the consequences to the commercial world would be most disastrous. Declare that the bills of exchange must be delivered up to be cancelled, and that the plaintiff's acceptance of the bills of exchange transmitted by the defendants, the Berlin Discount Company, having been made on the faith of the bill of lading which accompanied the bills of exchange being genuine, and not forged, the plaintiff is not bound by his acceptance, and make the injunction perpetual. Both parties have been innocently defrauded, and therefore I give no costs on either side, except against the defendant Homeyer.

NOTE.—Lord Mansfield, in the case of *Robson v. Calze*, Dougl. 228, laid down the principle, that even at law, although a third person shall not be punished for the fraud of another, he shall not avail himself of it. And he took the distinction as to the appropriation of this principle at any time before the completion. If the contract was completely performed by payment, and it was sought to recover the money back, a different principle would apply.

1859.

EVERSFIELD v. THE MID-SUSSEX RAILWAY
COMPANY.

Nov. 18.

THIS was a motion for an injunction to restrain the company from further proceeding under a notice of the 27th of September, 1858, or from taking any steps to procure the assessment of the purchase-money of the said piece of land comprised in such notice, and to carry into effect the purchase thereof.

A railway company, under its compulsory powers, is not entitled to acquire the fee simple in land for the mere purpose of excavating soil in order to construct an embankment.

The plaintiff is the owner of land in the parish of Horsham, and by an Act of Parliament (the 21 Vic.), the construction of a railway was authorized, by the name of the Mid-Sussex Railway, which ran through a portion of the plaintiff's land. The Act incorporated in it so much of the provisions of the Companies Clauses Consolidation Act, the Lands Clauses Consolidation Act, and the Railway Clauses Consolidation Act, as were not expressly repealed by the special Act.

The railway was nearly finished, so far as it passed through, or abutted on, the plaintiff's property.

On the northern side of the railway embankment was a triangular piece of land of about half an acre, bounded on the other two sides, on one by a road, leading to Cobbet's Bridge, and on the other by property belonging to Mr. Thorpe. The bill averred that this piece of land was of great value to the plaintiff, as through it lay a private road which was the plaintiff's only available mode of access to his farm, called Cheesworth Farm.

The said piece of land was within the company's line of deviation.

The plaintiff and the company had entered into a temporary arrangement for the sale to the company of the soil at so much a yard, for the purpose of completing an embankment,

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The bill stated, that shortly previous to the 20th of September, 1858, the plaintiff for the first time received an intimation that the company, being desirous to obtain leave to excavate soil from the land of Mr. Thorpe for a similar purpose, had, without the knowledge or sanction of the plaintiff, entered into an agreement with Mr. Thorpe, to sell to him the plaintiff's triangular piece of land as the consideration for granting such lease.

The plaintiff immediately gave notice to the company's solicitors, Messrs. Carnsew & Eady, that he would not sell the fee simple in the said piece of land, to which those gentlemen replied that they were then about to apply to the plaintiff to know the price of the fee simple of the land, as they had proposed purchasing it, and exchanging it with Mr. Thorpe for ballast, but that after such expression of the plaintiff's wishes, they would think no more of such purchase.

Some dispute having arisen about the terms of the agreement for the sale of the soil, the plaintiff caused notice to be served on the company, and on Mr. Dierden, one of their contractors, not to enter on the said piece of land; and on the 22d of September, 1858, Mr. Sadler, the plaintiff's solicitor, wrote to the company's solicitors as follows:—

“I may add that Mr. Eversfield is determined not to sell the land to the company or to any other person.”

A lengthened correspondence took place between the plaintiff's solicitor and the solicitors of the company, from which it appeared that there had in fact been a negotiation between the company and a Mr. Thorpe, for the sale to him of the plaintiff's piece of land after the company had excavated as far as was convenient, but which the company alleged had been broken off.

On the 27th of September, 1858, the company's solicitors sent to the plaintiff's solicitor a personal notice to treat for the purchase of the said triangular piece of land, which notice stated to the effect, “that the lines of railway by the Act authorized to be made would pass through the

said piece of land, and that the same was required by the company for the purpose of the railway, and that it was the intention of the company to take the same with all buildings and other erections, trees, rights, and easements of or belonging to the same, and to contract, and they thereby agreed to contract for the purchase of the same, and of all subsisting leases, terms, estates, and interests therein, and for all compensation to be made for any damage by severance or otherwise that might be sustained by the plaintiff by reason of the execution of the works, and requiring within twenty-one days after service of the now stating notice, the said plaintiff to deliver or cause to be delivered, a statement in writing of the particulars of such estate."

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The notice was accompanied by the following letter from the company's solicitor, dated 27th of September, 1858:—

"We beg to forward notice and tracings in duplicate of the land required by the company of Mr. Eversfield in addition to that already purchased. We shall be obliged if you will return one of the forms and tracings with acceptance of service indorsed. We have served the notice for the purpose of satisfying you of the power of the company to take the land, the same being required for the purposes of the line. We need scarcely remind you that if the company purchase the land in this way, they can excavate to any depth, but as they really have no wish to annoy Mr. Eversfield in any way, they are prepared to treat with him for it on certain reasonable conditions as to the preservation of the timber, the depth of excavation, and any other matters that he may consider of importance to his estate. They have already made an offer to Mr. Witt to purchase subject to a condition that it should not be built upon."

The bill averred:—"The said company have, in fact, entered into such agreement as hereinbefore mentioned with the said Mr. Thorpe to convey to him the said triangular piece of land, and the said notice to treat for the purchase thereof is not a *bonâ fide* exercise of the powers

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vested in the said company by the said Act of Parliament, nor is the said triangular piece of land required for the purposes of the said railway, but the same is merely required and intended for the purpose of enabling the said company to carry out the said agreement with the said Mr. Thorpe."

"The said company sometimes pretend that the said triangular piece of land is, in fact, required for the erection of works or other purposes of the said railway, whereas the same piece of land is at a considerable distance from any station, and could not be required for any such purpose, and is, in fact, not intended to be so used."

The company alleged that they required the land for the purpose of obtaining the soil.

Argument.
 —

Mr. *Bacon* and Mr. *Eddis*, for the motion.—The question at issue is, whether because this piece of land is within the limits of deviation the company are empowered under their compulsory powers to take it from the plaintiff. It is proved that the railway so far as it passes over the plaintiff's estate is constructed, but the company allege that they require the land for the purpose of excavating the soil in order to form an embankment on a part of the line. The answer to this claim is, first, that they have no right to acquire the fee simple, under their compulsory powers, unless for the purpose of constructing the railway. If they want the soil merely they can obtain it by purchase from the plaintiff, or in case of his refusal, they can proceed under the 33d section of the Act 8 Vic. c. 20, but they have no right under their compulsory powers to claim the fee simple when they merely require the soil. The truth was, the company required the fee simple in order to make a bargain with Mr. Thorpe.

Webb v. The Manchester and Leeds Railway Company (a), was cited.

Mr. *Malins* and Mr. *Waller* for the company.

The company cannot sell the land to Mr. Thorpe, because, by the 128th section of the Lands Clauses Consolidation Act, the company is bound to offer the surplus lands to the present owner, and this disposes of the main foundation of the plaintiff's bill.

But it was shown by the evidence that the company really required the land for the purpose of obtaining the soil, and it is submitted that this was a purpose within the meaning of the Compulsory Clauses.

Stamps v. The Brighton and South Vale Railway Company(b), was cited.

Mr. *Bacon* was not heard in reply.

The VICE-CHANCELLOR :—

The simple question is, whether on the true construction of these Acts of Parliament the defendants can show that the plaintiff's land is necessary for the purpose of constructing their railway.

That the possession of the plaintiff's land might be convenient to the company and save them some expense is possible, but the evidence has failed to show that it is necessary within the meaning of the Act. The first proposal to purchase the land in order to sell it to an adjacent landowner is not calculated to produce a favourable impression.

Upon the whole I decide this case simply on the ground that the defendants have not shown that it is necessary within the meaning of the Act that they should have the plaintiff's land in order to construct their railway.

This decision was appealed from, but affirmed by the Lords Justices on the 8th of December, 1858.

(b) 2 Phill. 673.

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June 20.

DODD v. THE SALISBURY AND YEOVIL RAILWAY COMPANY.

Compulsory powers to take land are given to railway companies, and must be exercised, for the sole purpose of constructing the railway and works; therefore, where a railway company endeavoured, by means of their compulsory powers, to construct a road so as to accomplish a subsidiary object, they were restrained by this Court at the instance of the landowner whose property would be affected, though the proposed works were within the scope of their Act.

Seemle, the saving of expense is a legitimate consideration in exercising the compulsory powers given to a railway company.

THIS was a motion for an injunction to restrain the company from taking possession of or entering upon the plaintiff's house, garden, and premises, situate at Castleton, near Sherborne, or any part thereof, and from taking any proceedings for the purpose of purchasing, taking possession of, &c., &c., the said garden.

The plaintiffs are the tenants for life in possession and expectancy, and the trustees, under the will of Thomas Dodd, of certain hereditaments, including the house, garden, and premises, at present in question.

In 1854 the Salisbury and Yeovil Railway Act was passed, authorizing the company to construct a railway from Salisbury to Yeovil; and to purchase the necessary lands; and in 1857 a further Act passed, authorizing certain deviations.

The plaintiff's house, garden, and premises, were, by the second Act, brought within the line of deviation.

The railway crossed Castleton Street, near the centre, about three feet below the level of the street. It accordingly became necessary to alter the road, and on the deposited plans it was proposed that the street or road (called No. 19) should be raised thirteen feet, and carried over the railway by a bridge. And by the 12th section of the Act power was given to the company to make the approaches to the bridge at an inclination of not less than one in sixteen feet, which is four feet less than is allowed by the Railway Clauses Act.

By raising the level of the street or road, the houses on the south-west side of the street or road would be blocked

up, and the owners and occupiers entitled to considerable sums for compensation.

Mr. Digby, the proprietor of Sherborne Castle, objected to the steepness of the proposed road; and, as it was alleged by the plaintiffs, and not denied by the defendants in their evidence, offered to contribute to the expense of altering the road.

The north-east side of the street was comparatively free from houses, and the company, as they alleged, partly in order to avoid payment of such compensation, partly to accommodate the proprietor of Sherborne Castle, and partly to obtain a less steep incline, proposed to carry the road by a gentle curve to the north-east of the road No. 19, marked in the deposited plans, and in the Act of Parliament; but in order to do so it became necessary to take the plaintiff's premises, which were at the north-west of the projected road. Accordingly, in the end of 1858, the company served the usual notice upon Mrs. Dodd, the tenant for life, that they would require the house and garden, &c., &c., for the construction of the railway. In reply to that notice Mr. Chandler, the trustee of Thomas Dodd's will, wrote to the company's solicitor offering to sell the property for 400*l.*; but no answer having been returned to such offer, on the 15th of April he wrote again, stating that the rent was higher than he supposed, but that he would take thirty years' purchase on the rental. He added, "I think it is competent for us to resist the power of the company to take this property, it being wanted for the accommodation of Mr. Digby." This letter elicited an inquiry from the solicitor of the company, whether the right of the company to purchase the property was denied. In reply, Mr. Chandler wrote as follows:—

"Sherborne, April 21, 1859.

"Salisbury and Yeovil Railway and Dodd.

"Dear Sir,—I deny the right of the company to take

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these premises, on the ground that they are not wanted for the purposes of the railway, but to obtain a new and handsome road to Sherborne Castle, and that road one not contemplated by the Act. See the case of *Eversfield v. The Mid-Sussex Railway Company*, 32 L. T. 202.

“Yours, &c.,

“B. CHANDLER.”

On the 17th of June, the company's solicitor wrote as follows:—

“King's Arms, Sherborne,

“June 17, 1859.

“Salisbury and Yeovil Railway and Dodd.

“Dear Sir,—300*l.* is the amount we offer for these premises, being advised that such is their value. Mrs. Dodd refuses to accept this; and to-morrow they will be valued under the 85th section of the Lands Clauses Consolidation Act, as the contractors threaten us with proceedings if we do not instantly give them possession. If on communication with your client you find she will accept, please write me, to Delahay Street, and I will not lodge the amount of the valuation in court.

“Yours, &c.,

“JNO. LEATH, *pro*

“HODDINGS, TOWNSEND & Co.

“Pray get rid of the impression that we are exceeding our powers; I have made inquiries, and it is not so.

“To B. Chandler, Esq.”

The plaintiff, on the 20th of June, filed this bill for an injunction, and charging “That the company could only take compulsory possession of the said premises by an undue and fraudulent exercise of the powers conferred on them by the Acts of Parliament.”

Mr. *Giffard* and Mr. *Hardy*, for the plaintiffs.

This case is within the principle of *Eversfield v. The Mid-Sussex Railway Company* (a). The principle of that decision is, that railway companies are not to be at liberty to make use of the compulsory powers given them by the Legislature for any purpose except the construction of the railway and the necessary works. In that case the company endeavoured to take the fee simple of land which they did not want, except for the purpose of obtaining soil, because they supposed in that way they would save money. Here the company are induced to alter the road marked in the plan, because Mr. Digby has promised to contribute to the expense.

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Mr. *Malins* and Mr. *Townsend*, for the company.

It is quite clear that, putting aside for the moment the question of undue influence, the company are authorized to alter the road as proposed. The land lies within the limits of deviation, and is a better road for the public. It is well settled that a company is not bound to construct the works exactly as laid down in the plan, or there would be no use in giving companies the line of deviation. (*The North British Railway Company v. Tod* (b); *Beardmer v. The London and North-Western Railway Company* (c); *Wood v. The North Staffordshire Railway Company* (d); *Regina v. The Caledonian Railway Company* (e); *Little v. The Newport and Abergavenny and Hereford Railway Company* (f); and *Breynton v. The London and North-Western Railway Company* (g), were also cited.)

Then, as to the case of *Eversfield v. The Mid-Sussex Railway Company*, it had no application here. In that

(a) *Ante*, p. 150.

(b) 12 Cl. & F. 722.

(c) 1 M. & G. 112.

(d) *Ibid.* 278.

(e) 15 Jur. 396.

(f) 17 Jur. 209.

(g) 10 Beav. 238.

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case the company claimed the right to take the fee simple of land which they did not require, in order to obtain the soil which they could obtain by contract, or under the Act.

As to the question of undue influence—even supposing it were shown that Mr. Digby was to contribute towards making the proposed road, which it was not—that circumstance would not deprive the company of their right to do the act complained of, if it were within their powers.

Mr. *Giffard* was not heard in reply.

Judgment. The VICE-CHANCELLOR:—

This case seems to be within the principle of the decision in *Eversfield v. The Mid-Sussex Railway* (a). That principle is, that in constructing works under the authority of Acts of Parliament for the purposes of the railway, the company are not at liberty to make use of their compulsory powers to attain a subsidiary object. Those powers, which are great powers, are given to the company solely to enable them to construct their works in a convenient and proper way, and for no other purpose whatsoever.

When they got their Act of Parliament, in 1857, the company knew that their proposed railway would pass across the road numbered 19. They knew, they must have known, and it was their duty to know in what way the construction of the railway, with the necessary accommodation works over road No. 19, would affect the owners of the neighbouring houses. Therefore it was, that the 12th section of the Act provides that in the construction of the railway, "It shall be lawful for the company to make the road No. 19, when altered for the purpose of the Act, of any rate of inclination not steeper than one in sixteen."

(a) *Ante*, p. 151.

It is true Parliament did not compel the company to construct this road, but it is equally true that this Act was passed by the Legislature on the footing, that this road No. 19 was to be crossed at an inclination of not less than one in sixteen. But the company now say they have discovered a better and more convenient road than No. 19. But better and more convenient in what respect? They mean less expensive, and less expensive because to construct road No. 19, at the inclination specified, will block up the doors of several of the neighbouring houses, and will place the company under the obligation of compensating the owners of such houses. On the other hand, by adopting the line marked in the plan, which will run through the plaintiff's house, they can construct a new road at less expense than that contemplated and authorised by the Act of Parliament. The main ground on which the superiority of the proposed new road is rested by the evidence, is the saving of expense; but it is also said, that this new road will be a convenience to the proprietor of Sherborne Castle, and that he will therefore bear part of the expense, and that, but for that circumstance the road No. 19 would never have been abandoned.

This is a stronger case than even that of *Eversfield v. The Mid-Sussex Railway*, and involves a principle which affects the public more forcibly than even that case. Here the company, for the execution of their works, have power to make various roads; and if the company were to be allowed to submit to the influence that might be brought to bear upon them from different landowners, there would be no means of knowing in which direction the roads might be made, or whose property might be injured. So far as this part of the case is concerned, it is really this, that because the owner of Sherborne Castle thinks the proposed road would be a convenience, and has offered to contribute to the expense, the company insist on taking

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the plaintiff's property. Anything more opposed to the spirit of the statute, can hardly be conceived.

But at the same time, I recognise fully the right of the company to proceed with their works in the way that is least expensive, provided they do not seek to accomplish that object at the expense, and to the injury, of persons whose property would not be required at all by the company, except in the endeavour to do something not contemplated by Parliament, and which is only made of importance to the company by circumstances which have nothing to do with the construction of the railway. If a company is to be influenced in the exercise of their compulsory powers, not with a view to the advantages of the works, but by landowners who have private purposes of their own to serve, there is no saying how far the mischief might extend.

There must therefore be an injunction in the terms of the prayer of the bill.

The company appealed against this order, but the Lords Justices, on the 1st of July, 1859, continued the injunction, but without prejudice to any question, and with liberty to the defendants to try the question at law, and reserved the costs.

1859.

LEGG v. MACKRELL.

July 19.

UNDER the will of James Morton Gray, Henry Mackrell was appointed trustee for Elizabeth Jane Legg and her children, and in pursuance of such trust invested the share to which Mrs. Legg was entitled under the testator's will in the purchase of 287*l.* Consols, and duly paid the dividends to Mrs. Legg down to October, 1856. In May, 1857, Henry Mackrell died and appointed his widow his sole executrix.

Mrs. Legg, who was in New South Wales, about two years after the trustee's death, applied to the executrix for the dividends, but she refused to obtain payment of the dividends, or to take any part in the matter of the trust, and persisted in such refusal.

The executrix did not pay the money into court under the Trustee Relief Act.

Mrs. Legg then filed a bill praying for payment of the dividends, for the removal of the trustee, for the appointment of new trustees, and that the defendant might pay the costs of the suit.

Mr. *Sandys* now asked that the defendant might pay the costs of the suit. Nothing could have been easier than for this trustee to have received the dividends and have paid the whole fund into court. Instead of taking this course, she put the tenant for life of this small fund to the expense of a bill in this court.

Norway v. Norway (a) was cited.

Mr. *Bacon* and Mr. *Hingston* for the trustee.

Executors, guardians, and trustees are awarded costs,

Where the representative of a deceased trustee made a suit necessary by a wanton refusal to act in the trust and to receive the dividends of the trust fund—*Held*, she was not entitled to the costs of a bill filed to remove her and appoint other trustees.

Semble, a disclaiming trustee is entitled only to costs as between party and party.

Argument.

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unless they have greatly misbehaved themselves (a). Here there was no pretence that the trustee had misconducted herself. In *Rashleigh v. Masters* (b), the Court gave the trustees their costs, though they made a claim and failed. In *Greenwood v. Wakeford* (c), where the trustees filed a bill to administer the trust rather than take the trouble on themselves, they got their costs.

Lewin on Trustees, 872, 873, was also cited.

Judgment.
 —

The VICE-CHANCELLOR:—

The rule as stated in Mr. Lewin's valuable work on Trustees is that a disclaiming trustee is entitled to costs, but only as between party and party. In *Sherratt v. Bentley* (d) the rule is stated differently.

The truth is, in all cases the jurisdiction of the Court as to costs is incidental to its jurisdiction over the subject matter of the litigation; and the only safe general rule is, that the party who fails in the litigation ought to pay the costs. The principle of the rule laid down by Mr. Lewin is, no doubt, this: that a disclaiming trustee, inasmuch as he has not the custody of the trust property, is only entitled to costs as an ordinary defendant to a suit.

In this case the suit is made necessary by the obstinate refusal of the trustee to act in the trusts. On the other hand, the suit is made an expensive one by the prayer that the defendant should pay the costs of the litigation, which in a measure compelled the defendant to resist the suit. At the same time, the trustee might easily have relieved herself from all responsibility by paying the trust fund into court under the Trustee Relief Act, and I cannot admit the right of a trustee wantonly to occasion considerable expense because he does not choose to take the proper means to get rid of his responsibility. In this case,

(a) *Beames on Costs*, 57,
 citing 1 Eq. Ca. abridged.
 (b) 1 Ves. 204.

(c) 1 Beav. 576.
 (d) 1 Russ. & M. 655.

the obstinate refusal of the trustee to do anything made the suit inevitable, and but for the bill praying, as a part of the relief claimed against, that she should pay the costs, I should have made the trustee pay the costs of this suit. But as neither party is entirely free from blame, there must be no order as to costs.

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Judgment.

The Vice-Chancellor subsequently, as the more convenient course, ordered the defendant to transfer the fund, and, as this involved an act in execution of the trust, gave her 10*l.* costs out of the fund.

COOK v. THE EARL OF ROSSLYN.

May 26,

MR. BETHELL WALROND, by his marriage settlement dated in 1829, covenanted with the defendant, Lord Rosslyn, then Lord Loughborough, and F. W. Russell, to transfer 2400*l.* Bank Stock immediately, and 7000*l.* within twelve months, to the trustees, upon the trusts of the settlement.

A tenant cannot sustain a bill of interpleader in this court against his landlord, unless the title be affected by some act done by the landlord subsequently to the lease.

It was by the settlement provided that it should be lawful for Mr. Walrond during his life, and for the trustees after his decease and during the minority of the children, to demise or lease any part or parts of the said manors, messuages, lands, tithes, and other hereditaments, for any term not exceeding twenty-one years in possession, and not in reversion, at the best or most improved rents, &c., &c.

Lord Rosslyn, the father of the intended wife, also covenanted to pay 10,000*l.* on the same trusts.

On the 10th of November, 1829, the marriage was solemnized.

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 v.
THE EARL OF
ROSSLYN.
 —
Statement.

Shortly after the marriage Mr. Walrond, on behalf of the trustees, agreed with Sir Eliab Harvey for the purchase of the house No. 8, Clifford Street, Bond Street, for a sum of 8100*l*.

The 2400*l*. Bank Stock paid to the trustees by Mr. Walrond being the only available fund, it was arranged that the purchase should be made by means of that fund, which produced 5154*l*., and that the residue should be borrowed by Mr. Walrond, on the security of the said property, and be paid off out of the first available capital. Accordingly, the sum of 3200*l*. (including 229*l*. 14*s*. for law expenses) was borrowed, and the deficiency, 75*l*., paid by Mr. Walrond.

The sum of 3200*l*. was borrowed from Sir William Franklin, and the purchased property conveyed to him to secure such amount.

By indentures of lease and release dated the 11th and 12th of June, 1830, between Mr. Walrond of the first part, Lady Janet Walrond of the second part, and the trustees of the third part, reciting the contract, and that the residue of the purchase-money was intended to be paid out of the trust monies, the said house and premises were conveyed and appointed in fee to the trustees of the settlement.

On the 26th of June, the mortgage was transferred to Mr. Capron.

By an indenture dated the 26th of September, 1848, between George Capron of the first part, the Rev. H. Gibbs and W. Hedding (the mortgagees) of the second part, Mr. Walrond of the third part, and Robert Cook (Tailor) of the fourth part, the said houses and premises were demised to the said R. Cook for twelve years and a half, at the rental of 300*l*. a year. The lease contained the following provision: "And it was thereby provided, agreed, and declared, between and by the said parties thereto, that in the meantime and until the said parties of

the second part (the mortgagees) should require to have the receipt of the rents and profits of the said thereby demised premises, and should give unto the said R. Cook, his executors, administrators or assigns, or leave at the said thereby demised premises, notice in writing requiring the said R. Cook, his executors, administrators or assigns, to pay the said rent thereby reserved to them the said trustees of the second part (the mortgagees), the said yearly rent of 300*l.* thereby reserved should be paid to the said B. Walrond, his heirs and assigns; and the receipt of the said B. Walrond, his heirs or assigns, should, until such notice should be given or left as aforesaid, be a good and sufficient release and discharge of the said yearly rent, and any part thereof, unto the said R. Cook, his executors, administrators or assigns. And the said R. Cook did thereby for himself, his heirs, executors, administrators and assigns, covenant, promise, and agree with and to the said parties of the second part (the mortgagees), and also as a separate covenant with the said B. Cook, his heirs and assigns, that he the said R. Waldron, his executors or assigns, should and would well and truly pay, or cause to be paid, unto the said B. Walrond, his heirs or assigns, until such notice should be given as aforesaid, and afterwards to the said parties of the second part (the mortgagees), all the said clear yearly rent," &c., &c.

Some time after Midsummer, 1857, the trustees of the settlement gave notice to Mr. Cook not to pay the rent to Mr. Walrond; and on legal proceedings being threatened, the tenant filed a bill of interpleader, and on the 12th of May, 1859, an injunction was granted to restrain Mr. Walrond from commencing an action for the rent, on the terms that the amount due, 512*l.* 3*s.* 9*d.*, should be paid into court.

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Mr. *Craig* and Mr. *Clement Swanston*, for the motion.
 First, it is now too late to take this objection, because

Argument.

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the parties have interpleaded together, and the money has been actually paid into court, in the suit. The rent is properly trust property, and ought to be given to the trustee who has given notice not to pay the rent to Walrond. In *Stuart v. Welch* (a) it was held that the broker who had insured a ship at the direction of one of the owners, was entitled to file a bill of interpleader on being sued by another of the owners.

Mr. *Jones Bateman* appeared for Lord Rosslyn, and admitted he had claimed the rent from the tenant.

Mr. *Bacon* and Mr. *Jolliffe*, for Walrond.

There can be no doubt that the plaintiff is perfectly safe in paying the rent to his landlord. In *Jew v. Wood* (b) it was held to be a proper case for interpleader, on the ground that the landlord's title was defective under the will of the testator; but that case bore no analogy to this.

Crawshay v. Thornton (c), and *Stuart v. Welch* (d) were also cited.

Judgment.

The VICE-CHANCELLOR:—

By the general rule of the Court, which is so convenient that it should be strictly observed, a tenant is not entitled to maintain a bill of interpleader against his landlord.

Lord Rosslyn, in the case of *Dungey v. Angove* (e), laid down the rule in these terms: "The only case in which a tenant can come into this court by an interpleader bill is, where the lessor has done some act himself that embarrasses the tenant, which is the case of a mortgage;" that means, by a mortgage granted after the lease. And at

(a) 4 M. & C. 305.

(b) Cr. & Ph. 185—196.

(c) 2 M. & C. 1.

(d) 4 M. & C. 305.

(e) 2 Ves. 303—4.

page 307, he says, "While the tenant is bound by contract to pay to Angove" (that is, the lessor), "Hernal (the mortgagee) may eject him, and may bring an action for use and occupation, but he never can for the rent. This is a different demand. The parties interpleading must each in supposition have a right to the same demand." Such is the rule as stated by Lord Rosslyn.

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Lord Eldon, in deciding the case of *Cowtan v. Williams (a)*, had to consider the right of a tenant to file a bill of interpleader against his landlord. The Attorney-General, for the defendant, insisted that the tenant could not file a bill of interpleader against his landlord. Mr. Romilly, for the plaintiff, distinguished this as a case of exception, where the question arises from the act of the landlord, subsequent to the lease. Lord Eldon concurred in that distinction, and mentioned "*Lord Thomond's case*, in which a bill of interpleader was filed by tenants against their landlord and persons claiming annuities granted subsequently to the lease; and the bill was supported by Sir Thomas Sewell, the tenant being by the act of the lessor entangled in a question which he could never settle."

In the present case, the legal estate is in mortgagees, who concurred in the demise executed by Mr. Walrond, in exercise of a power. The title of the plaintiff is derived under the mortgagees and under Mr. Walrond, but with a covenant upon the part of the plaintiff to pay the rent to Mr. Walrond, unless it shall be demanded by the mortgagees. It is said, however, that notwithstanding this stipulation, Lord Rosslyn was a trustee; that the plaintiff's having notice of Lord Rosslyn's title, whether it be a mere equitable title or not, yet, having notice of it when he is applied to by Lord Rosslyn as well as by Mr. Walrond to pay his rent, he is entitled to file a bill of interpleader,

(a) 9 Ves. jun. 107.

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and to call upon this Court to determine which of these two defendants are entitled.

But the rule is plain, that no tenant has a right to file a bill of interpleader in any such case. The principle of the rule seems to be, that if one party by a deliberate covenant with another engage to pay a sum of money, and that other person has not by any dealing of his own entangled his right to recover that money so secured, it is not competent to the covenantor, on the ground that a claim is made by some person asserting a paramount title, to file a bill of interpleader in this court. Here, knowing the state of the title, the tenant chose to take possession from those who had the legal estate by an arrangement between the trustees and Mr. Walrond, who is the donee of the power, that the rent should be paid under his covenant to Mr. Walrond, until the other parties, of whom Lord Rosslyn was not one, should think fit to give any other direction.

But it has been said, and with very great force, that it is not competent now to the defendant to take the objection, inasmuch as both parties have in fact interpleaded by engaging in the contest. I find that the Court, upon the motion of the plaintiff and upon hearing both defendants, ordered the plaintiff to pay the money into court, and directed the rest of the motion to stand over till this day. No doubt, in directing the motion to stand over until this day, the Court may be said in a sense to have reserved any question involved in the case. But still, that was not the way in which either of these defendants ought to have acted. The case is one in which, on the allegations of the bill, the defendants might have raised their defence by demurrer; and if they had taken that course, the question might have been disposed of at little expense. As the matter now stands, the Court has dominion over the fund. It appears, however, that one of the defendants is no party to the contract; and though it is true he has served a

notice on the tenant not to pay the rent, it is plain that such notice can have no operation, inasmuch as the receipt of such defendant would be nugatory, and could not protect the plaintiff from being sued on the covenant by the defendant Walrond. Under such circumstances, this is clearly not a case in which the jurisdiction of this Court can be properly exercised in an interpleader suit.

Strictly the proper order, therefore, will be that the money paid in may be repaid to the plaintiff Cook.

The only remaining question is as to the costs; but, considering the way in which the defendants have conducted the case, it is impossible to say they have a right to throw the costs upon the plaintiff. All the parties seem to have acted under a mistaken view of their position. The plaintiff has proceeded by interpleader in a case in which, according to the rule of the Court, he was not entitled to do so. The defendants, instead of demurring, have come to interplead. Each party must bear his own costs.

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1856.

May 27, 28,
30.

DAVIES v. PARRY.

A mortgage taken by a solicitor from his client to secure monies alleged to be advanced, and also certain costs, ordered to stand as security only for what on taking a general account should be found due, it appearing that the defendant, on taking the security, produced to his client no stated account of the amount due, and had kept no record of the transactions; and the solicitor, having in his answer made misstatements as to some of the items, was ordered to pay the costs of the suit to the hearing.

THIS bill was filed by John Davies, of Pantymarchog, in the parish of Llanarthney, in the county of Carmarthen, farmer, against Thomas Parry, of Carmarthen, who had been his solicitor; and it prayed an account of all dealings and transactions between the plaintiff and the defendant, and of all sums of money paid or advanced by the defendant to or for the use of or on account of the plaintiff, and of all sums of money received by or come to the hands of the defendant for or on account of or for the use of the plaintiff; and that in taking such accounts, all bills of costs claimed to be due to the defendant from the plaintiff might be taxed; that it might be declared that an indenture of mortgage dated the 30th of September, 1856, was void and might be delivered up to be cancelled, or that it might be declared that the same should stand as a security for what, if anything, should, upon taking such account, appear to be justly due from the plaintiff to the defendant; and that the defendant should be decreed to pay to the plaintiff what on taking such account should be found due, and if necessary to reconvey the mortgaged hereditaments.

The deed which was impeached bore date the 30th of September, 1856, and was between the said John Davies of the one part, and the said Thomas Parry of the other part; and after reciting that the said Thomas Parry had at various times advanced and lent to the said John Davies several sums, amounting in the whole to 1053*l.* 19*s.* 9*d.*; and reciting that the said John Davies was also indebted to the said Thomas Parry in the sum of 65*l.* for professional business transacted by the said Thomas Parry for the said John Davies, and that there was then due from the said John Davies to the said Thomas Parry the sum of

1118*l.* 19*s.* 9*d.*, as appeared by an account on that day stated, settled, and signed between them; and that the said John Davies had requested the said Thomas Parry to lend him the further sum of 20*l.*, which the said Thomas Parry had agreed to do on having the whole of the said money, with interest, secured to him in the manner therein mentioned. It was by the said indenture witnessed that in consideration of the said sum of 1118*l.* 19*s.* 9*d.*, and the sum of 20*l.*, the said freehold hereditaments therein described, were conveyed by the said John Davies to the said Thomas Parry and his heirs, subject to a mortgage of 1400*l.* and interest to a Mrs. Jones. The deed also contained a proviso for redemption, and an absolute power of sale in default of payment at the time of the execution of the deed. The defendant delivered to the plaintiff the following account:—

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" 1853. 27th May. Principal on note of this			£	s.	d.
date			563	13	8
Interest thereon from 24th October,					
1855, to the date of the deed,					
30th September, 1856			26	4	11
" 1854. 11th Feb. Principal on this note .			19	0	2
Interest from date to 30th Sept.,					
1856			2	10	0
" 1855. 10th Oct. Principal on this note .			422	10	0
Interest from date to 30th Sept.,					
1856			20	1	0
Bill of costs			65	0	0
" 1856. 30th Sept. Cash to be then ad-					
vanced (as agreed to between the					
parties) to be paid to Mrs. Job					
Jones			20	0	0
			<hr/>		
			£1138 19 9"		
			<hr/>		

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With regard to the item of 65*l.* charged for the bill of costs, it was admitted that no bill of costs was ever delivered to the plaintiff; but the defendant in his answer alleged, that the draft bill was made out, but no copy was ready when the deed was executed, and that the plaintiff alleged he would send for it.

With regard to the item of 19*l.* 2*s.*, the bill charged that in August, 1851, the plaintiff was appointed provisional assignee in insolvency of a person named John Thomas, and that the defendant pretended that on the occasion of such appointment he paid, at the request of the plaintiff, the sum of 19*l.* 0*s.* 2*d.*; but the plaintiff charged that no such payment was made. The defendant by his first answer swore that he had paid this sum in the matter of the insolvency previously to October, 1855.

By his second answer, he admitted that this statement was not accurate. He alleged that he had forgotten the history of the transaction, and that the money was not in fact paid, but that he had given an undertaking to pay certain costs, under which, in May, 1858, a claim was made, and which he had satisfied.

The bill alleged that the plaintiff was an illiterate person, and that he could scarcely read or write more than his own name; that he was wholly unacquainted with law matters, and was obliged to trust wholly to his legal adviser when required to sign legal documents.

The bill alleged that the deed was executed by the plaintiff in ignorance of its contents, and under the coercion of the defendant.

The principal question was as to the consideration for the mortgage deed.

A further question was raised whether the two promissory notes dated the 27th of May, 1853, and the 10th of October, 1855, were to stand as *primâ facie* evidence of the amount secured thereby.

The plaintiff deposed that except as to two or three

sums not exceeding 100*l.*, he had not, nor had any person on his behalf, received from the defendant the sums of money alleged to be due on such notes; and that if he signed them, he did so without knowing what they were for, or the purport and effect thereof.

The plaintiff deposed that he had not, to the best of his recollection, signed the notes; but it was proved by several witnesses that he had done so, and that he had read the notes over, or that they had been explained to him.

The defendant admitted that he had not paid to Mrs. Jones the sum of 20*l.*, which he had charged as paid, but he alleged that he intended to pay the amount; but before he could do so, owing to her absence from home, the plaintiff's solicitor (subsequently employed) had done so.

The mortgage to Mrs. Jones was effected in this way. In 1843, the plaintiff had mortgaged certain real estates to a Mr. David Jones. The defendant's brother-in-law, Richard Harries, who became his articled clerk and afterwards his partner, in February, 1849, advanced 300*l.* to the plaintiff, and a deed of mortgage was executed, which was prepared by the defendant, who was the only solicitor engaged. On the 7th of June the mortgage was transferred by Harries to David Jones, the defendant being the only solicitor. On the 24th of December, 1849, the plaintiff executed another mortgage to Mrs. Richards. On the 20th of June, 1851, these three mortgages were transferred to Mrs. Jones, and a deed of further charge executed for 300*l.*, making up a total of 1400*l.* The transaction was completed thus by Mrs. Jones:—

	£	s.	d.
A cheque to David Jones for . . .	1103	2	4
A cheque to the defendant for . . .	265	7	8
Retained by Mrs. Jones for interest . . .	31	10	0
	<hr/>		
	£1400	0	0
	<hr/>		

Out of the sum of 265*l.* 7*s.* 8*d.* the defendant deposed that

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he paid 215*l.* 7*s.* 8*d.* to Mrs. Richards, leaving in his hands a balance of 50*l.* 7*s.* 8*d.* He deposed he was unable to recollect whether any such sum came into his possession. He admitted he kept an account at the bank, but no book or ledger was produced.

The defendant in his answer alleged that previously to May, 1853, he had advanced and paid divers sums of money, for which the plaintiff had given various memorandums, notes of hand, and vouchers. That on the 27th of May, 1853, he had a meeting with the plaintiff for the purpose of having a settlement of accounts, when the principal and interest were calculated at 563*l.* 13*s.* 8*d.*, and the plaintiff gave him the note for that amount dated the 27th of May, 1853; and he, the defendant, gave up to the plaintiff all the memorandums and vouchers in his possession, and a memorandum was signed by the plaintiff to the effect that a balance of 563*l.* 13*s.* 8*d.* had been found due from the plaintiff to the defendant, independently of costs, which remained to be settled.

The defendant further alleged that the same course was pursued on the 24th of October, 1855, when the amount for interest on the former note and for sums advanced amounted to 422*l.* 10*s.*, and that he then gave up the vouchers as before.

A witness, named Morris, proved that the plaintiff was in the habit of borrowing money from the defendant, and that he saw him sign the note.

A witness, named Phillips, proved that he saw the plaintiff sign the note, and the defendant delivered up certain vouchers, &c.

The memorandum of the 27th of May, 1853, stated, "That an account was this day settled of all the notes of hand held by Mr. Parry of John Davies, of Pantymarchog, and money paid by Mr. Parry for him, save the mortgage money, interest, and Mr. Parry's bill of costs, which are to be settled hereafter."

There was no evidence except the averment of the defendant, that on either of the occasions on which the two notes were given there was any regular statement of account.

It was admitted by the defendant that, as to the sums of 65*l.* and 19*l.* 0*s.* 2*d.* and interest, the plaintiff was entitled to an account.

Mr. *Malins* and Mr. *Roxburgh*, for the plaintiff.

In ordinary cases the rule is, that the establishment of one mistake is sufficient to induce the Court to give a decree entitling the party to surcharge and falsify the accounts: *Lawless v. Mansfield* (a); but as between a solicitor and his client, "the solicitor is bound, irrespective of his securities, to prove the debt for which these securities were given (b)."

Here the evidence showed that two serious mistakes had been made by the solicitor, and that no solicitor had been called in to act for the plaintiff when the securities were given; and it was submitted, therefore, that on both the grounds put by Lord St. Leonards, the whole account must be opened.

Morgan v. Higgins (c), was also cited.

Mr. *Bacon* and Mr. *Nalder*, for the defendant.

It was proved that the plaintiff knew perfectly well what he was doing when he signed the notes and executed the deed; and though there had been a mistake as to small items in the accounts which might perhaps entitle the plaintiff to an account, at all events the accounts settled in May, 1853, and October, 1857, ought to be treated as settled.

Mr. *Malins* was heard in reply.

(a) 1 Dr. & W. 603-4.

(b) Ibid. 606.

(c) *Post*.

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The VICE-CHANCELLOR :—

Lord Eldon, in *Cooke v. Setree* (a), adverting to the difficulty attendant on cases of this class, and to the duties of a solicitor towards his client, said “that a temperate and just consideration must be applied to each case,” and such unquestionably is the duty of the Court.

In this case the circumstances are so extraordinary that with respect to two items of 65*l.* and 19*l.* 0*s.* 2*d.*, the defendant's counsel are constrained to admit that as to those items, the mortgage deed ought to stand only as security for so much as, on taking the account, shall be found to be due. But if this be so, it follows that the transaction must be opened, and the deed cannot be allowed to stand as a security for the amount which it recites to be due from the plaintiff. It follows also, that the statement of account on which the defendant relies, cannot be sustained as a correct statement, because in it these two items are charged which the defendant is compelled to admit were not properly entered, more especially as to the item of 65*l.*, which was the amount of a bill of costs that had not then been produced.

It is clear, therefore, that as to this part of the case, the mortgage deed cannot be supported.

There remain, however, the two promissory notes, which the defendant insists are conclusive, or at least *prima facie* evidence that the amount for which they were given is due to the defendant. These notes were given in May, 1853, and October, 1855, respectively, and on the occasion of the execution of the mortgage deed they formed the principal items in the account, and interest was also computed upon the two sums for which they purported to be given. So far, therefore, the evidence is *prima facie* in favour of the defendant.

But upon a closer examination of the evidence, important

(a) 1 Ves. & B. 136.

considerations arise. The defendant alleges, that as to the note dated in May, 1853, there was a meeting at his office, between him and the plaintiff, for the purpose of settling the account between them, and that the amount due for principal and interest on the several securities which he alleged he held, was calculated. Under such circumstances, the duty of the defendant was plain. He was in the confidential relation of solicitor to the plaintiff, the alleged debtor, and it was his bounden duty to have stated an intelligible account, with the items set forth in a clear and simple manner, and to have preserved a proper record and vouchers of the items contained in such statement. Such was the defendant's clear duty. But how does the case stand in this respect? There is no evidence that in making this statement the defendant made use of any record of previous transactions, that he referred to any cash-books, or to those documents which it is the duty of a solicitor to keep, as evidence of the state of money transactions between himself and his client.

It may be said that the vouchers were produced, and an account might have been stated from them; but the great defect in the defendant's case is, that there is no evidence of any account having been stated at all. When the amount was calculated, it was for principal and interest upon each instrument, and the amount of the balance alleged to be due was stated to be the sum of 563*l.* 13*s.* 8*d.*, but there is no evidence that the defendant made any statement of accounts susceptible of proof to any one. This was such a neglect of that duty and of that caution which, for his own sake, every solicitor ought to observe towards his client, that if any inconvenience or loss is occasioned by the neglect, it must fall upon the person who has been guilty of that neglect in not making out and preserving a statement of account.

When, therefore, the question arises whether these notes are, in taking an account, to stand as *prima facie* evidence

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that the amounts expressed upon them are justly due from the plaintiff to the defendant, the mere statement of the defendant, that such an amount is really due, is not sufficient without the production of that evidence which he has never yet given, and which, having regard to the relation between the parties, he ought to be able to furnish.

The defendant has produced Morris, and Phillips his clerk, the latter of whom is the attesting witness to the notes and to the memorandum, to prove the circumstances under which the note of May, 1853, was signed. Morris proves that the plaintiff had been in the habit of borrowing money from the defendant, and that there were transactions between them which raised a strong presumption that there was money due from the plaintiff to the defendant. He proves he was present when the plaintiff signed the note, but he does not state that he saw the account produced. Phillips's evidence does not go so far; he proves that the plaintiff understood the note, and, to the best of his recollection, all the vouchers, receipts, and notes were at the same time delivered up. But he does not attempt to prove that any account was stated or produced. The memorandum of the 27th of May, 1853, states "that an account was this day settled of all the notes of hand held by Mr. Parry of John Davies, of Pantymarchog, and money paid by Mr. Parry for him, save the mortgage money account and Mr. Parry's bill of costs, which are to be settled hereafter; and a balance of 563*l.* 13*s.* 8*d.* was found to be due." But how was this balance found to be due? Not upon a proper statement of account, or proper settlement of account.

Where it is admitted that mistakes have been made, where there is no clear evidence that any account of previous transactions was ever stated, it is impossible to treat these notes as *primâ facie* evidence of the debt.

The proper decree will therefore be :—Declare that the

mortgage deed shall stand as a security only for what, if anything, shall be found to be justly due from the plaintiff to the defendant at the date of this security.

Direct an account of all dealings and transactions between the plaintiff and defendant, and that all bills of costs be made out and taxed.

Refer it to the chief clerk to inquire and certify whether the whole or any, and what part of the principal monies expressed in the promissory notes was due from the plaintiff at the date of the notes respectively.

The defendant must pay the costs up to the hearing. He comes into this court not only under an obligation to give an account, but in his first answer he has made a mistake as to a considerable item in the account. Further consideration will be reserved.

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July 27, 29.

CLARK *v.* FERGUSSON.

In the case of an infringement of a recent patent, it is not a matter of course to require the plaintiff to establish his right at law, but the Court will have regard to the whole case made on the pleadings and by the evidence.

Where the bill described the plaintiff as a lieutenant in Her Majesty's ship *Gladiator* now on service, the Court refused to compel him to give security for costs.

THIS was a bill filed by William Clark of Langhaugh, Galashiels, in Scotland, described as a lieutenant in her Majesty's ship *Gladiator*, now on service, praying for an injunction that the defendants, their servants, agents, and workmen, might be restrained from making or manufacturing, using or selling any blocks made according to or in imitation of the mode observed in the plaintiff's letters patent.

The bill stated that on the 12th of April, 1859, a patent was granted to the plaintiff, his executors, administrators, and assigns, for an invention for an improved safety block to be used for lowering ships' boats, and applicable to other like or analogous purposes, for fourteen years from the date thereof, fully to be completed according to the statute.

On the 20th of July the plaintiff caused the specification to be filed, which described the invention as consisting of certain combinations of mechanism, whereby by means of an eccentric hook attached to the bottom of the lower blocks of a boat's tackle, the boat could be freed from the tackle by which it has been lowered immediately on touching the water.

The principle of the invention seemed to be that the weight of the boat, while suspended in the air, caused such a pressure on the catch that held the hook in the form of an ellipse, that it was impossible to disengage it, but on the boat touching the water, and relieving the pressure, the catch was readily removed, and the hook opened and disengaged the boat.

Immediately after the grant of the letters patent, the plaintiff employed the defendants, Messrs. Fergusson, block

makers, at Millwall—Nash, the other defendant, being their foreman blacksmith—to manufacture his invention; and in that way the defendants, Fergusson and their servant Nash, first became aware of the principle of the plaintiff's invention, and of the combination or arrangement of mechanism by which it was proposed to be performed.

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Statement.

The defendants manufactured for the plaintiff certain blocks according to the invention described in such specification, and in the course of such manufacture they stated to the plaintiff that the defendant, James Nash, had discovered a mode of manufacturing the plaintiff's blocks, which was an improvement upon the mode described in the said specification; and requested the plaintiff to introduce such alleged improvement into the specification which he was about to file, and in consideration thereof, to allow the defendants a share in the profits.

The plaintiff having refused to accede to this proposal, the defendants claimed the right to work their foreman's invention, exclusively of the plaintiff's interest, and refused to give up the blocks made to his order.

The defendant Nash subsequently applied for letters patent for his invention.

The bill alleged that the defendants' invention was an infringement of the plaintiff's letters patent, and that the variations were merely colourable, and did not vary the principle or main features of the plaintiff's invention.

The bill charged that the alleged invention or improvement of the defendant James Nash, was founded upon the information furnished to the defendants by the plaintiff in the course of their employment as his agents, as aforesaid, and that the defendants made use of the information derived by them in course of their employment by the plaintiff, as aforesaid, for the purpose of obtaining the said provisional protection, and of the proceedings for procuring the said letters patent.

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—
Argument.

July 27.—Mr. *Malins* and Mr. *Druce* for the defendants, moved that the plaintiff should give security for costs, as he was out of the jurisdiction. The rule was, that where it appeared on the bill that the plaintiff is an officer in the service of the Crown, and out of the jurisdiction, the defendant would be entitled to the usual security for costs, unless it be distinctly stated that the plaintiff is on active service: *Lillie v. Lillie (a)*. Here the bill did not state that the plaintiff was on actual service, but did state that his residence, when not on service, was out of the jurisdiction. It was submitted, therefore, that the defendant was entitled to have security given for the costs.

The VICE-CHANCELLOR :—

The bill states, though not perhaps with as much precision as might be wished, that the plaintiff is “an officer in Her Majesty’s ship *Gladiator*, now on service,” and that averment is substantially sufficient to exempt him from giving security for costs.

July 29.—Mr. *Bacon* and Mr. *Freeling* now moved for an injunction. The plaintiff having discovered an improved kind of block for lowering boats from a ship in motion, obtained letters patent for his invention, and employed the defendants to manufacture specimen blocks as his agents. It was clear, therefore, they had no right to make use of the plaintiff’s invention for their own purposes. But they pretended to have invented an improvement on the plaintiff’s invention, but even if that were true, which it was not, they could not make use of the plaintiff’s invention without his licence; still less could they manufacture his invention against his will.

Mr. *Malins* and Mr. *Druce*.

The plaintiff’s patent was only granted on the 12th of

(a) 2 M. & K. 404.

April, 1859, and the rule being that even where the validity of a patent was doubtful, the patent was ordinarily granted, inasmuch as an error in refusing would be irreparable, *Russel's Patent* (a), this Court, then, would not grant an injunction in such a case, without requiring the plaintiff to prove his title by an action at law. In this case the plaintiff claimed to have discovered an improved block, but the defendants, or rather their foreman blacksmith, had made a great improvement on the plaintiff's invention, supposing it were genuine, and had applied for a patent for such improvement. In such a case, the proper order would be, that both patents should be vested in trustees for the benefit of both parties: *Russel's Patent* (b).

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This is not a case in which the plaintiff's title is disputed. The litigation has been occasioned by the plaintiff's refusal to embody his plan with the improvement or alleged improvement made by the defendant's servant.

But it is argued that the date of the plaintiff's patent is so recent, that he is not entitled to the protection of the Court, except upon the terms of establishing the validity of his patent by an action at law. Seeing, however, the way in which the opposition to the plaintiff's right arose, at so late a stage, it would be hard now to put him to the expense and delay of an action at law in order to secure his right. It is not a mere matter of course, because a patent is recent, to call on the patentee to establish his rights at law before he can obtain relief in this Court. It is in the discretion of the Court to require a plaintiff to assert his rights at law or otherwise, according to the nature of the case. Here what mainly

(a) 2 De G. & J. 130.

(b) Ibid.

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or altogether led to the validity of the plaintiff's patent being disputed was, his refusing the proposal for amalgamation.

There must, therefore, be an injunction till further order.

Jan. 24.

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The devisees of lands charged with payment of legacies, devised his estate at H. to S., on trust to sell, and in the meantime, to let the said estate, and apply the rents and net proceeds towards payment of his debts, and the legacies charged thereon by his testator's will.

—*Held*, an express trust for the payment of the legacies; and on a bill filed by the legatees

against the representative of the trustee, it was held that the claim was not barred by the 40th section of the 3 & 4 Wm. IV., c. 27.

The provisions of the 40th section do not apply to cases of express trusts.

JOHN BOWES the father, late of Houghton, in the county of Cumberland, deceased, by his will dated the 27th of November, 1826, gave and bequeathed to his daughter, the plaintiff Ann Watson, the wife of the plaintiff John Watson, 200*l.*, and to his daughter the plaintiff Elizabeth Mark, the wife of the plaintiff Thomas Mark, the like sum of 200*l.*, and to his daughter Jane Bowes, 200*l.*, and to his son the plaintiff, Robert Bowes, 200*l.*, and to his son the defendant Isaac Bowes, one annuity or clear yearly sum of 10*l.* during his life, to be issuing and payable out of his the testator's freehold messuages, lands, tenements, and hereditaments at Houghton aforesaid, devised to his son John, and to be paid to him by his the testator's said son John, half-yearly; and the testator directed the said legacies to be paid by his executor at the

end of twelve months next after his decease, without interest. And he thereby charged and made chargeable all his freehold messuages and tenements, or estates at Houghton or Harker, or elsewhere, with the payment of the said legacies and annuity and all his just debts, funeral, and testamentary expenses; and subject thereto, he gave, devised, and bequeathed all his said real estate and all his stock, crop, and husbandry utensils, household goods and furniture not previously disposed of, debts, money, and all other his personal estate and effects, unto his said son John Bowes, his heirs, executors, administrators, and assigns absolutely, and appointed his said son John the sole executor of his will.

John Bowes the father, died on the 29th of August, 1830, leaving his son John Bowes, the executor, his heir-at-law, and leaving real and personal estate more than sufficient for the payment of his debts, funeral expenses, and in aid of the legacies; John Bowes, the son and executor, entered into possession of the real and personal estate, but never proved the will of his father, or paid any part of the annuity or of the legacies.

John Bowes the son, by his will, dated the 11th of September, 1832, gave and devised to James Bell, Mathew Bell, and George Saul, and their heirs, his freehold estate at Houghton formerly the property of his great-uncle John, also his freehold estate at Houghton, purchased of George Gilliburn, and his estate at Harker, then in the occupation of Richard Mitchinson, upon the trusts following: that is to say, as to his estate at Houghton formerly the property of his great-uncle John, upon trust for his (the testator's) son John Bowes, on attaining twenty-one, and as to his estate at Houghton, purchased of George Gilliburn, upon trust for his (the testator's) son, James Bowes, their heirs and assigns for ever, as tenants in common. And as to his estate at Harker, upon trust for his said trustees, and the survivors and survivor, or the heirs

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of the survivor, absolutely to sell and dispose thereof, and in the meantime, and until such sale, to demise and let the said estate, and after deducting all expenses attending such letting, and sale or sales, to apply the rents and net proceeds thereof, in or towards payment of his just debts, and the legacies charged thereon by his the testator's late will, and the legacy bequeathed to his (the testator's) daughter. And in order to facilitate such sale or sales, the testator directed that the receipts of his said trustees, and the survivors or survivor of them, or the heirs of the survivor, should be a good and sufficient discharge for the purchase-money. And in case the rents and proceeds of sale should be insufficient for the purposes aforesaid, then he thereby authorized his said trustees to raise such deficiency by mortgage of his said estates at Houghton; and he thereby charged the hereditaments devised to each of his sons as aforesaid with one-third of the amount of such deficiency; and he in like manner directed that the receipt of his said trustees should be a sufficient discharge for such mortgage monies. And as to all his stock, crop, husbandry utensils, household goods, and furniture, debts owing to him, and all other his personal estate and effects, he bequeathed the same to his said trustees upon trust, to collect and get in all debts owing to him, and to sell such part of his stock, crop, and husbandry utensils, as were upon the estate occupied by him, late Gilliburn's, and apply the said debts and proceeds of such sale, towards payment. In the first place, of his funeral and testamentary expenses, and then in liquidation of his debts so far as the same would extend; and as to his household furniture, upon trust to divide the same amongst his children upon their respectively attaining the age of twenty-one years, in such manner as his said trustees should deem expedient; and he directed that the estate, late Gilliburn's, should be let by his trustees, and the rents received and applied by them in the maintenance and education of all his children, until his said

sons, James and Thomas, should have both attained the age of twenty-one. And he further directed the trustees to permit his brother Isaac Bowes, and his sister Jane, to continue in possession and management of his estate at Houghton, devised to his the testator's son John, until he should attain twenty-one, and cultivate and manage the same until that period for the benefit of the whole of his children, his, the testator's wish being, that his children should reside with his said brother and sister so long as his said trustees might consider proper; or he authorized, and empowered his said trustees in their discretion to let the same estate, and sell the stock, crop, and husbandry utensils thereon, and apply the same in and towards the maintenance and education of his said children, until his said son John should attain the age of twenty-one years, and he thereby gave and bequeathed to his daughter, Mary Bowes, the sum of 200*l.*, to be paid to her at twenty-one, but without interest, and he charged his real estate with the payment thereof in the proportions before mentioned, and he gave to his said trustees the guardianship of his said children and their fortunes, and appointed them joint executors of his will.

The testator, John Bowes the son, died the 19th of September, 1832, leaving four infant children. George Saul alone accepted the trusts, and proved the will of his testator; and also, on the 24th of October, 1834, obtained letters of administration with the will annexed, of John Bowes the father.

George Saul entered into possession of the rents and profits of the real estate and of the personal estate, including the farming stock, and including the real estate of John Bowes the father, and sold the farming stock of the Houghton estate for 188*l.*, exclusive of a sum of 65*l.* which Isaac Bowes agreed to pay for part of the said stock, and which George Saul allowed him to retain. George Saul put Isaac Bowes, the son of John Bowes the

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father, into possession of the Houghton estate, and allowed him to carry on the farming business until 1844, and to apply the proceeds in maintaining the four infant children of John Bowes the son. In 1833 George Saul sold the Harker estate for 2100*l.*, and received the purchase-money, and, being a solicitor, acted in the matter of such sale on behalf of Isaac Bowes and Jane Bowes, and obtained from them a deed poll releasing the Harker estate from their legacies and annuity (without prejudice to their claim on other real and personal estate of the testator), for the purpose of making a good title.

The produce of the Harker estate, together with the rents and profits, was insufficient for payment of the debts and legacies given by the will of John Bowes the son, and the deficiency became a charge on the Houghton estate under the will of the son, as of the father.

On the 9th of November George Saul paid Jane Bowes her legacy of 200*l.*, and paid 100*l.* on account of Elizabeth Mark's legacy, and 5*l.* on account of Robert Bowes' legacies, and made some payments to Isaac Bowes on account of his annuity, but refused to make any further payment, on the ground that the trust could not be settled under the will of John Bowes the son, until his youngest child should attain twenty-one.

In 1844 George Saul took possession of the two Houghton estates, but allowed Isaac Bowes, and the infant children of John Bowes the younger, to occupy the house; and he also sold some portion of the crops for 300*l.*

In 1844 George Saul mortgaged the two estates at Houghton for 2000*l.* He retained the estates in his own possession, and farmed them for his own benefit till 1851, when he let them to John Bowes, for 75*l.* a year. In 1853 Thomas Bowes, the youngest child of John Bowes the son, attained 21, when George Saul, with the concur-

rence of the children of John Bowes the son, sold the two estates at Houghton to a Mr. Fergusson, for 3105*l.*, out of which the mortgage for 2000*l.* was paid off.

The bill alleged that George Saul, on application being made for payment of the legacies, alleged that the estate of John Bowes the son was insolvent.

George Saul, on the 17th of April, 1853, gave the whole of his personal estate to his wife Luna Saul, absolutely, and devised to her his real estate during her widowhood, with a power of disposition among his relatives; and on her marriage, or in default of such disposition, he devised it among his nephews, and appointed his wife sole executrix of his will. He made a codicil to his will, dated the 20th of April, 1853, giving his widow power to dispose by will of 5000*l.*, in lieu of any settlement, and charged it upon his real estate. In default of such power being exercised, he directed the sum to sink into his real estates.

George Saul died the 26th of April, 1853, leaving the defendant Silas Saul his heir-at-law and customary heir.

This will was proved by his executrix on the 7th of September, 1854.

A suit was instituted by his executrix to administer the trusts of the will.

On the 27th of January, 1858, certain of the legatees under the will of John Bowes the father filed a bill to obtain payment of these legacies, and praying—

That the estate of John Bowes the son, and, so far as necessary, of John Bowes the father, might be administered.

That the amount due from the estate of George Saul in respect of the real and personal estate of John Bowes the son, or John Bowes the father, or the income and profits thereof, or the proceeds of the sale of the mortgage thereof respectively, might be ascertained; and in taking such account that the estate of George Saul might be charged with the profits of the farming business, of the

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stock, &c., &c.; or with an occupation rent, and the value of the farming stock, and with proper interest on the balances belonging to the estates, &c.

That the amount so found due from the estate of George Saul might be made good, and the real and personal estate of George Saul duly administered and applied, and, if necessary, sold for that purpose; or that, in case a proper decree for that purpose should have been made in the suit of *Saul v. Saul*, a proper proof for such purpose might be made in that suit, &c., &c.

There was little conflict as to the facts, the defence relied on being the Statute of Limitations.

Argument.
—

Mr. *Malins* and Mr. *Ferrers* for the plaintiffs.

The only defence relied on is the Statute of Limitations, and the question, therefore, really is, whether there is an

NOTE.—3 & 4 Wm. 4, c. 27; the 27th and 40th sections are as follows:—

Section 27. "Provided always, and be it further enacted, that nothing in this Act contained shall be deemed to interfere with any rule or jurisdiction of courts of equity in refusing relief on the ground of acquiescence or otherwise, to any person whose right to bring a suit may not be barred by virtue of this Act."

Section 40. "And be it further enacted, that after the said 31st day of December, 1833, no action, or suit, or other proceeding shall be brought, to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in

equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action, or suit, or proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was given."

express trust for the payment of these legacies, or whether they are merely a charge on the land. The position of the parties was this: the plaintiffs were legatees under the will of John Bowes the father, and therefore became creditors against the estate of John Bowes the son, and were *cestuis que trust* under the devise contained in his will. But a suit to make an executor account for a sum of money bequeathed to him in trust, which had been severed from the assets, and the interest applied in part performance of the trust, is not within the 40th section of the Statute 3 & 4 Wm. IV. c. 27 (*Phillipo v. Munnings* (a)). Such was the decision in that case, and it exactly applied to this. In *Gough v. Bult* (b), where a testator, who died in 1823, directed his trustees to raise a legacy by sale of his real estate, it was held that the legatee was not bound under the 40th section of the statute. In *Dillon v. Cruise* (c), where a trust for payment of the debts was created by the testator's will, it was held that a judgment creditor was not affected by the 40th section of the statute.

On the question of parties, *May v. Selby* (d) was also cited.

Mr. Bacon and Mr. Faber appeared for the representatives of the trustee George Saul.

Mr. Craig, Mr. Greene, and Mr. Deere Salmon. Mr. Jolliffe, Mr. C. H. Hall, and Mr. Bagshawe, jun., appeared for the other defendants.

They contended that this was a mere charge of the legacy on land, and was therefore barred by the 40th section of the statute.

In *Knox v. Kelly* (e), it was held that where devised

(a) 2 M. & C. 309.

(b) 16 Sim. 45 & 323.

(c) 3 Ir. Eq. Rep. 70.

(d) 1 Y. & C. C. C. 235.

(e) 6 Ir. Eq. 279.

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lands are charged with payment of a legacy in express terms, the case is within the 40th section, though not within the 25th section of 3 & 4 Wm. IV. c. 27.

In *Shephard v. Duke* (a), it was held that the 40th section of the statute applied to legacies payable out of personal estate as well as out of land. And in *Dundas v. Blake* (b) it was held that a devise of lands to A. for life, subject to debts, with a bequest of personal estate to enable her to pay the debts, did not prevent a judgment creditor from being barred by the 40th section of 3 & 4 Wm. IV. c. 27. In *Lord St. John v. Boughton* (c), though the Vice-Chancellor of England decided in favour of the claim on the ground of acknowledgment, he held that, but for that, it was barred by the 40th section.

In *Piggott v. Jefferson* (d), where an executor, who had possessed assets sufficient to pay a legacy, died, leaving it unpaid, and having charged his real estate with the debts, it was held that the right to sue for the legacy, as such, was barred by lapse of time, and could not be claimed under the charge of debts.

Hawker v. Hawker (e) was also cited.

Judgment.
 —

The VICE-CHANCELLOR :—

There are two questions raised in this case; first, whether this will creates an express trust for the payment of the legacies, or whether it merely charges the legacies on the land. It has been contended by the defendants that this is in effect a claim to recover a legacy charged on land; secondly, that the plaintiff's right is barred by the 40th section of 3 & 4 Wm. IV. c. 27.

On the second question, several cases have been cited, and in particular, decisions of three of the Irish

(a) 9 Sim. 567.

(b) 11 Ir. Eq. 138.

(c) 9 Sim. 219.

(d) 12 Sim. 26.

(e) 3 B. & Ald. 537.

Courts, which seem to countenance the notion that not only a mere charge, but even an express trust is within the 40th section of the Statute. There is certainly some colour from the high authority of the late Vice-Chancellor of England in the case of *Lord St. John v. Boughton* (a) in support of the proposition, that the case of sums to be paid by the trustees out of the proceeds of the sale of land devised upon a trust for sale, is within the 40th section. It appears that one eminent text-writer, Mr. Lewin, treats that decision as inconsistent with the general law of this Court. But it is due to that learned judge to observe that he decided the case on the ground of acknowledgment.

On the other hand, Lord Plunket expressed his opinion, that as between *cestui que trust* and trustee, where there is an express trust, and where the possession of the trustee can be ascribed to no other title than that of trustee, no length of time can bar the claim of the *cestui que trust*.

The reason why the 40th section of the statute contained a special enactment as to charges on land was, because doubts had been entertained as to the effect of lapse of time, in the case of charges on land as distinguished from express trusts.

It seems to me that the provisions of the 40th section do not apply, and were never intended to apply to cases of express trusts.

Lord Eldon, in the case of *King v. Denison* (b), noticed the distinction between mere charges and express trusts, which is the foundation on which the 40th section rests. In one sense any beneficial owner of land on which money is charged, whether devisee or grantee, is a trustee, though a trustee only by construction of law, because he has himself a beneficial interest in the land; but the trustee to whom land is conveyed upon trust to raise and pay a sum

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(a) 9 Sim. 219.

(b) 1 Ves. & B. 260.

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of money out of it, without any beneficial interest to himself in the money or the land, holds the land and the money arising from the sale of the land on an express trust.

Lord Eldon, in *King v. Denison* (a), used this language: "If I give to A. and his heirs all my real estate charged with my debts, that is a devise to him for a particular purpose, but not for that purpose only. If the devise is upon trust to pay my debts, that is a devise for a particular purpose and nothing more, and the effect of these two modes admits just this difference. The former is a devise of an estate of inheritance for the purpose of giving the devisee the beneficial interest subject to a particular purpose; the latter is a devise for a particular purpose, with no intention to give him any beneficial interest." In this passage Lord Eldon in clear language points out the distinction between money charged on land and a devise to a trustee, who has no beneficial interest, but who takes what he gets, charged with the payment of money. But as the devisee of land on which money is charged, might in some sense be deemed to be a trustee, the Legislature treats his possession as beneficial owner as an adverse possession of the land as against the person in whose favour the money is charged, and enacts that no claim shall be made to such money which is not preferred within twenty years.

Some of the cases cited during the argument show that some judges have overlooked the distinction between a charge on land and an express trust—a distinction which both Lord Cottenham and Lord Plunket kept in view.

In *Phillipo v. Munnings* (b) Lord Cottenham treated the suit as that of a *cestui que trust*, to recover the trust fund. It was contended that the 40th section of the statute was a bar to the claim, but Lord Cottenham held that the claim was not within the 40th section of the statute. He pointed out that the fund had been separated from the general assets of the testator, and therefore re-

(a) 1 Ves. & B.

(b) 2 M. & C. 309.

mained in the trustee's hands impressed with the trust created by the will. It had become subject to an express trust in favour of the *cestui que trust*, and there being an express fiduciary relation between the parties, the 40th section of the statute did not apply.

It follows, therefore, from this review of the authorities that the 40th section of the statute is inapplicable to cases of express trust.

It remains to consider whether the will in this case merely charged the legacies on the land, or whether the language created an express trust for the payment of the legacies.

The testator, John Bowes the younger, by his will, devised the Houghton and Harker estates *to trustees upon the trust thereafter declared*. As to the Harker estate, the trust was expressly declared to be, that the trustees who took his beneficial interest under the will, should sell the estate, and apply the proceeds in payment of these very legacies. The direction as to the Houghton estate was, that if the proceeds of the Harker estate should prove insufficient, the trustees were to mortgage the Houghton estate for the deficiency. And then followed a direction, that any deficiency should be a charge on the equitable interests on both estates. There was also a direction that the trustees should let the Houghton estate, and deal with it in such a way as to show clearly that the legal estate was to remain vested in them. It would have been clearly impossible for the trustees to have given effect to the trusts of the will, unless they had in them the legal estate. There is therefore an express trust within the distinction taken by Lord Eldon, in *King v. Denison*, and the subsequent words of charge on the equitable interest cannot cut down or lessen the effect of the devise to the trustees upon trust for the particular purpose.

It is necessary to consider whether there has been any breach of trust, for that there was an express trust is plain; and if so, it is equally plain from the authorities,

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that if there has been a breach of trust, the lapse of time is no bar to the claim of the plaintiffs to have the fund made good.

George Saul held the rents and profits of the estate impressed with an express trust, and did not apply them according to that trust. This neglect is as much a breach of trust as a corrupt misapplication.

George Saul, as to the Harker estate, acted as the solicitor, and by his advice, the *cestuis que trust*, who were his clients, executed a release. He stood towards them in a confidential relation, and that is always an important consideration, when the question is, whether a claim is barred by lapse of time. It is unnecessary, however, to go into this question, because this is the case of an express trust in which there has been a clear breach of trust by the trustee, and it is impossible to hold, that in such a case the lapse of time is any defence against the claim of the *cestui que trust*.

There must, therefore, be a declaration, that George Saul took both the estates, and received the rents and profits subject to an express trust, for (*inter alia*) the payment of these legacies, and that the proceeds of the sale of the estate, and the rents and profits received by him were subject to that trust, and that the assets of George Saul are liable to make good to the plaintiffs the amount due for principal and interest, and that he be charged with an occupation rent in respect of the property.

With respect to interest, there is some conflict in the authorities, but as this is the case of an express trust, and of a breach of trust as to the trust fund, and not the case of a mere charge, it seems to me that the 40th section of the statute does not apply, and the legatee is entitled to interest during the whole period. There must therefore be a declaration, that the assets of George Saul are chargeable with interest on the legacies, from one year from the death of John Bowes the younger.

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TOWNEND v. TOWNEND.

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WILLIAM TOWNEND, of Bradford, Yorkshire, cotton spinner, by his will dated the 19th of June, 1839, after confirming the articles of partnership referred to as having been entered into between himself and his brothers, the defendants Robert and Edward Townend, and having directed payment of his just debts, &c., &c., devised and bequeathed to his said brothers Robert and Edward Townend and Isaac Holden, now of St. Denis, near Paris, their heirs, executors, administrators, and assigns, all and singular his real and personal estate, upon trust to pay to the said Isaac Holden out of the personal estate a legacy of 50*l*. And upon further trust to levy and raise by way of sale or mortgage of the said real and personal estates the sum of 12,000*l*., and to hold the same upon the trusts following, *i. e.*:—I declare my will and mind to be that they (the trustees) shall stand possessed of the said sum of 12,000*l*. upon trust, to lay out and invest the same in their or his names or name in Parliamentary Stocks or public funds of Great Britain, or at interest on Government or real security in England or Wales, or in shares in some railway company, or other company, authorized by Act of Parliament, and to alter, vary, and transfer such stocks, funds, or securities of a like nature from time to time, and as often as occasion shall require, or any of my said trustees or trustee for the time being may think proper;

Executors and trustees, surviving partners of the testator, directed by his will to invest an infant's legacy on Government or real securities, took a security for it in the form of a mortgage on the freehold and leasehold property and fixtures belonging to the partnership in which they were the testator's surviving partners.

Held, that they were bound to account for the profits made by so employing the legacy and interest in their trade. And the will directing the interest to be accumulated from the testator's death; but by the partnership articles the principal not

being payable, but only interest at five per cent. for five years after the testator's death—*Held*, that the amount of interest on the legacy should be computed with annual rests up to the date of the security, which was dated and taken on the day when the amount of the testator's share was payable.

Held, that the entry by the executors in the partnership books of the amount of the legacy to the credit of the legatee, was a sufficient admission of assets.

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provided, nevertheless, that every such investment, variation, or transfer which shall be made during the lifetime of my daughter Eliza Townend, shall, after she has attained the age of twenty-one years, be by her direction and with her consent and approbation testified in writing. And as to the interest, dividends, and annual produce arising from the said sum of 12,000*l.*, or the stock, funds, and securities in which the same may be invested, upon further trust that they, my said trustees or the survivors, &c., do and shall so long as my daughter Eliza Townend shall be living, and under the age of twenty-one years, pay and apply the same or so much thereof as they or he shall think sufficient for the maintenance, education, and support or otherwise for the benefit of her my said daughter Eliza Townend. And as to the surplus of any of such interest, dividends, and annual produce not so paid and applied for the benefit of my said daughter as aforesaid, upon trust that they my said trustees, &c., do and shall lay out and invest the same in manner aforesaid, and so accumulate the same at compound interest until my said daughter shall attain the age of twenty-one or die, whichever shall first happen, and upon my said daughter attaining the age of twenty-one years do and shall pay all the amount with interest, dividends, and annual produce, if any such there be, unto my said daughter for her own sole and separate use and benefit absolutely, and her receipt alone shall be a sufficient discharge for the same, whether covert or sole, and I direct the same shall not be subject to the debts or control of any husband she may marry. And from and after the expiration or determination of the trusts hereinbefore expressed and declared of and concerning the interest, dividends, and annual produce of the said sum of 12,000*l.* until my said daughter attain the age of twenty-one years upon further trust, that they, my said trustees, do and shall after my said daughter shall have attained

the age of twenty-one years stand seised and possessed of the said 12,000*l.*, and the stocks, funds, and securities in which the same may be invested, on trust to pay the interest, dividends, and annual produce arising therefrom, unto my said daughter Eliza Townend for and during the term of her natural life for her separate use, apart from any husband whom she may marry, and so as not to be subject to his debts, control, interference, or engagements, and without power to dispose of the same by way of anticipation, and so that her receipts alone shall be good and sufficient discharges." The testator then gave certain interests to the children of Eliza Townend, &c., immaterial to this question, and proceeded as follows:—"Provided always, and I do declare it to be my will and mind, that if there shall be no child of my said daughter Eliza Townend, or being one or more, such child or children, he, she, or they shall die under the age of twenty-one years without leaving lawful issue, him, her, or them surviving, then, subject to such appointment as aforesaid, that my said trustees do and shall, out of the said sum of 12,000*l.* stock, funds, and securities, and the interest, dividends, and annual produce thereof, raise and pay the legacies following, &c., and after full payment and satisfaction thereof, the residue and remainder of the said trust monies, stocks, funds, and securities, and the interest, dividends, and annual produce thereof, and all and singular the residue of my estates, real and personal, and property of any description, shall be held by my said trustee or trustees for the time being in trust for my said brothers Robert Townend and Edward Townend in equal shares and proportions as tenants in common, their respective executors, administrators, and assigns, for their own respective use and benefit absolutely."

The testator appointed his brothers Robert Townend and Edward Townend, together with Isaac Holden, his

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executors. He died on the 5th of April, 1844, leaving certain household furniture and his share in the business and in the business premises, part of which were freehold.

The business had been carried on by the testator and his said brothers, under certain articles of partnership dated the 1st of January, 1839, and which contained the following stipulations:—That the capital of the several partners should not be withdrawn from the partnership until the expiration of the term of seven years from the date of the articles; that the partners should take the profits and bear the losses of the business equally; that on the death of any of the partners within the term of seven years from the date of the articles, a valuation of his share and interest in the partnership should be come to as therein provided, between his executors and surviving partners as soon as might be thereafter; that the surviving partners or partner should pay the amount of such valuation within three years from the expiration of the said term with interest thereon at five per cent.; and in the meantime “for the amount of such value, when so fixed, the surviving or continuing partners should give security on a competent part of the partnership property for the payment of the amount of such share of the party so dying, &c., within three years after the expiration of the said term of seven years, with interest, after the rate of five per cent.”—to be paid as therein mentioned. That it should not be lawful for the heirs, executors, or administrators of any of the partners so dying, &c., to commence any action, &c., or other proceedings for recovering or compelling payment of the share of the partner so dying, &c., until the end of three years after the expiration of the said term of seven years: and further, that it should not be lawful for the heirs, executors, or administrators of any partner so dying, &c., to claim any share of or right of participation in the profits of the business made subsequently to the day up to which the said valuation

shall have been taken; "the intention and agreement of the parties thereto being, that the yearly interest after the rate of 5*l.* per cent. thereinbefore directed to be paid to the representatives of the parties so dying, &c., in respect of the amount of the said share of the stock so to be continued and employed in the concern for three years after the expiration of the seven years, should be accepted and taken by such representatives in lieu and satisfaction of all gains and profits or share of such which such representatives might otherwise have been entitled to claim. Provided nevertheless, that nothing therein contained should extend or be construed to restrain or prejudice the right of the heirs, executors, or administrators of the partner so dying, &c., within the said term of seven years, to commence and prosecute all such actions, suits, or other proceedings at law or in equity as should be necessary for obtaining and enforcing a full and just account and valuation of the said partnership, stock, &c., up to or at the time or respective times at which the same ought to be made and taken in case of the decease of any one or more of the partners before the expiration of the said term of seven years, or from obtaining and enforcing such sufficient and reasonable charge or security upon the said partnership estates, property, and premises, or a competent part or parts thereof as was thereinbefore mentioned for securing to the representatives, &c., the payment at the end of three years after the expiration of the said term of seven years, the amount of their share in the said partnership property and interest after the rate aforesaid in the meantime.

In November, 1857, Eliza Townend, the testator's daughter, attained twenty-one, and being dissatisfied with the account rendered by the defendants in 1858, filed this bill.

The bill charged that the testator's share in the partnership capital in 1844, was valued, after allowing for all

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liabilities and debts, at 20,888*l.* 17*s.*, exclusive of the profits of the business for 1844, amounting to 13,543*l.* 17*s.*

The plaintiff alleged that the defendants had never invested on proper security the 12,000*l.* given by the will, and claimed therefore to be entitled to a share in the profits realized by such sum which had been retained and allowed to form part of the partnership capital, after giving credit for the amount paid for her maintenance, &c.

The bill charged that the transaction which the defendants alleged to be a proper investment was, in fact not an investment within the terms of the will.

The defendants alleged that by a mortgage deed dated the 21st of July, 1853, after reciting that Robert Townend and Isaac Holden had agreed to lend to Edward Townend the sum of 12,000*l.* out of monies belonging to them and the said Edward Townend, on a joint account; on having repayment of the said monies thereby secured, it was witnessed that in consideration of the said sum of 12,000*l.* at or before the execution of these presents to the said Edward Townend paid by the said Robert Townend and Isaac Holden, the said Edward Townend did thereby grant and convey unto the said Robert Townend and Isaac Holden, their heirs and executors, the lands and hereditaments therein described, subject to a proviso for redemption.

The property comprised in the deed was the business premises, which were chiefly leasehold, but a small part of the premises was freehold.

The bill charged that this mortgage was not a proper investment, that no money had been raised, that the property comprised in the deed was the business premises, and that the transaction was a mere expedient to enable the executors to retain the 12,000*l.* in their hands as capital in order to carry on the business.

In the account rendered the defendants had credited the plaintiff with 12,000*l.* on the 1st of January, 1849, with

interest at 5l. per cent., and with yearly rests up to 1853, and from thence with interest at 4l. per cent., but the plaintiff was debited with 5l. per cent. interest on all sums advanced to her.

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The bill prayed that the trusts of the will might be carried into execution under the direction of the Court. That it might be declared that the mortgage was not a proper security, and that the said sum of 12,000l. had been employed by the defendants Townend in the business. That an inquiry might be directed what part of the said sum of 12,000l. had been employed in the partnership business at the time of and since the testator's death, and of the amount of the profits.

The bill also prayed for the payment to the plaintiff of what should be found due in respect of the profits or other accumulations of income of the said sum of 12,000l.

Mr. *Malins*, Mr. *Craig*, and Mr. *Beaumont*, for the plaintiff.

Argument.

The evidence established here these facts, that the defendants had not raised, appropriated, and invested the 12,000l. in pursuance of the direction in the will, but had retained the money in the business under colour of a loan by one executor and trustee to his co-executors and co-trustees on the security of the business premises, which, had there been no other objection, were not freehold if adequate.

This was, therefore, a case of surviving partners trading with the share of their deceased partner, and on the authorities it was clear that the person entitled to such share was entitled to a rateable proportion of the profits.

In *Crawshaw v. Collins* (a), where the partnership was dissolved by the bankruptcy of one of the partners, the assignees were held entitled (beyond an account and dis-

(a) 15 Ves. 218; s. c. 1 J. & W. 267; and 2 Russ. 325.

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tribution of the stock) to a participation in the subsequent profits made by the continuing partners carrying on the trade with the capital as constituted at the time of the bankruptcy.

In *Featherstonhaugh v. Fenwick* (a) it was held that after a dissolution partners continuing to trade with the joint property must account for the profits.

In *Brown v. De Tastet* (b) it was held that a surviving partner who retained the capital of his deceased partner and employed it in the business, was bound to account for the profits derived therefrom, after making proper allowance for the management of the business; but in such case he would not be allowed any remuneration for carrying on the trade: *Burden v. Burden* (c). This was the rule as to simple partnership, but in *Wedderburn v. Wedderburn* (d), where the partners as here were executors, this principle was acted on after the lapse of thirty years, and a share in profits under successive partnerships was decreed, although there had been several settlements of accounts. In that case the partners were also executors, as here.

In *Jones v. Foxall* (e) a trustee who ought to have withdrawn a trust fund from a trading firm of which he was a member, was charged (instead of profits, it being for the plaintiff's interest) with compound interest at 5% per cent.

In *Docker v. Somes* (f) it was held that a trustee, who mixed trust monies with his private funds and employed both in a trade adventure of his own, was bound (at the option of the *cestui que trust*) to account for a proportionate share of the profits instead of interest.

MacDonald v. Richardson (g) was also cited.

(a) 17 Ves. 298.

(b) Jac. 284.

(c) 1 V. & B. 170.

(d) 2 Keen, 722; 4 M. & C. 41.

(e) 15 Beav. 388.

(f) 2 M. & K. 655.

(g) *Ante*, page 81.

Mr. *Bacon* and Mr. *Wickens* for the defendants.

There was nothing to show that at any time before 1853 the executors had 12,000*l.* or any sum in their hands as the share of the deceased partner. In 1853, no doubt the defendants had the amount given by will to the plaintiff in their hands. They invested that amount on ample security, and had accounted for part, and were willing to account for the whole of the balance of the interest thereon. The fund, therefore, was never employed in the business ; it was never subject to the risk of trading, and the claim of the plaintiff to a share of the profits of the business could not be sustained. But even supposing the money had remained in the firm, it did not follow that the plaintiff was entitled to a share of profits calculated on the amount of her claim under the testator's will. The principle on which her share in the profits must be calculated would be the source of the profits, the nature of the business, and the other circumstances of the case: *Willett v. Blanford* (a).

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Mr. *R. W. E. Foster* appeared for the defendant Holden.

The VICE-CHANCELLOR :—

The question is, whether from the 1st of January, 1849, the plaintiff is entitled to charge her two uncles, the executors of her father's will, with the profits made from the employment by them in trade of the legacy of 12,000*l.* It is said, first of all, that it is not clear that any such sum as 12,000*l.* was in the hands of these executors on the 1st of January, 1849. Upon that point I must hold the entry in the books of these defendants conclusive upon them : first of all, because they have made these entries knowingly ; and secondly, because they have shown no

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(a) 1 Hare, 253.

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reason whatever to induce the Court to think that the entries were in any degree mistaken entries. On the contrary, besides making entries, they went into a subsequent transaction, which is perfectly consistent with those entries. It is a settled principle of law, and equity too, that if a man influences the conduct of another by making a representation, and he can make good that representation, upon the faith of which the other party has acted, he shall not escape from the effect of that representation, but shall be held bound to make it good. Upon that principle it must be assumed against the two defendants Townend, that there was in their hands upon the 1st of January, 1849, 12,000*l.* which they were bound to invest and secure according to the trusts of their brother William's will. The difficulty which arises in the case is from the nature of the proceedings which, I believe, they very honestly took in order to obey the directions in the will, which required them to give a security for this legacy. They acted upon consideration—they acted upon advice. Their co-executor Isaac Holden had no interest in the matter, except to discharge his duty and to see that they discharged theirs. The proposal made to him was to sanction an investment on the security of the partnership property—the existing assets of that partnership of which their deceased brother, the testator, had been a member. If Isaac Holden had sanctioned a proposal to lend the money upon the security of the capital of any other trading concern, and the money had been so invested, if the investment had been improper (as it would have been), the legatee must have looked to Holden to make good the consequences of any error in the investment. For, as between the *cestui que trust*, the legatee, and those persons who for the purpose borrowed the money from the executor, there would be no right as between the legatee and *cestui que trust* to any account of profits at all, for the plain reason

that there could in that case be no privity at all between the *cestui que trust* and the borrower of the money. The borrower of the money, borrowing it upon a security to the satisfaction of the lender, might employ the money for what purpose he pleased. That was not this transaction. This transaction was, that Holden lent the money to his co-executors and co-trustees, and lent it upon the security of that very property from which it was his duty to have recovered it. According to the provision of the will, it was his duty to have invested it either in Government or real securities, or railway investments, as prescribed by the testator. No real property, except to an amount much larger than any real property to be found here, would be sufficient. Leasehold property was not within the terms of the trust, for it is not real property within the terms of a trust framed as this is. Therefore, so far as the nature of the property goes, there was not a proper investment. But as regards the persons to whom the money was lent, the transaction was conducted in such a way as, in my opinion, to leave no doubt as to the consequences of such a transaction. It was not lent to a stranger, it was lent to the co-executors, who are the continuing partners of the testator, and it was lent upon the security of that trading property in which the testator, up to his death, had a share. If Holden had not been a co-executor, or if the gentleman, whose duty it was to invest this money in Government or real securities, or railway shares, had lent it to them or given a security to some third person as a trustee for their niece, the result of the transaction would have been exactly the same. It would have been an improper application of the trust-moneys; it would have been a transaction in which the trustees, who were bound to invest the money in Government or real securities, or railway shares, kept the money in their own hands, gave a security for it, but employed the money in trade for their own profit. That conduct

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this Court will not permit; and if such a transaction takes place, the *cestui que trust* of the money, the legatee in this case, has the option of charging the executors and trustees who use the money in trade. No matter what the security they may have given for it, if they keep it in their own hands on security and use it in trade: it is in their hands trust money still, and for the profits they must account. The circumstance that Holden approved of the investment cannot alter the conduct of these trustees in employing the money of their *cestui que trust* for their own profit. Therefore, it seems to me the Court is bound to declare that this lady, who is now come of age, is entitled to the profits of the trust monies made by her two uncles, the defendants Townend, since the 1st of January, 1849. It is said that is a severe and penal decree. I conceive it to be a decree which the law of this Court makes it imperative upon me to pronounce. At the same time I am perfectly sensible that, in questions of this kind, I have, in the way of charging trustees with compound interest, gone further than some other judges of this Court. There was a case of gross neglect by a trustee—I refer to the case of *The Attorney-General v. Alford*—in which I charged the trustee with compound interest. But the Lord Chancellor Cranworth having reversed that decision, I should have felt bound in this case by his decision if the circumstances had been the same in the present case. I have observed, however, that in a valuable Text Book (Lewin on Trustees) the decision of Lord Cranworth is commented on as inconsistent with several cases of high authority, which probably were not referred to in the argument. But the present case seems to me to be of a different kind. Making rests and charging compound interest are questions attended with difficulties which do not occur in a case where the Court finds a trustee using for the purposes of his own trade trust monies which he ought otherwise to have invested. My impression is, that looking

at the terms of the will and the conduct of the parties, the plaintiff is entitled to an account of the interest on the 12,000*l.* with annual rests up to the 1st of January, 1849, and from that date an account of the profits. But I wish to suggest to the parties the propriety of avoiding the delay, expense, harassment, and inconvenience of having the accounts taken in chambers, by fixing upon a gross sum, to be agreed by both sides.

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The case having stood over till the following day, when it appeared that the negotiation had not been successful, after some further discussion—

The VICE-CHANCELLOR said that, according to the terms of the will and the articles of partnership, this young lady, from the 1st of January, 1849, was entitled to have the interest at five per cent. upon 12,000*l.* applied for her benefit; and that so much of that money as was not expended upon her education ought to have been accumulated. It was quite plain that that sum could not have been taken out of the business; for by the terms of the partnership deed the plaintiff had covenanted that money should not be taken out of the business until seven years from the date of the articles. The plaintiff, therefore, was entitled to an account of what was due to her for principal money and interest at five per cent. upon the legacy of 12,000*l.* from the death of the testator up to the 1st of January, 1849, with annual rests, allowing for all sums expended for her maintenance and education. Then, if she was entitled to an account of profits from the 1st of January, 1849, he could not see upon what other sum the account could be taken than upon the balance found to be due at that time. The profits, therefore, must be calculated upon the sum that should be so found due by the chief clerk's certificate, the chief clerk distinguishing between what was due for principal and what for interest.

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There must also be a decree for the immediate investment of the 12,000*l.*, and the account would be for profits up to the date of the investment; and a decree for payment to the plaintiff of the whole amount of what should be found due for accumulations of interest up to the 1st of January, 1849, and of what for profits on the capital found due at that date, with liberty to apply.

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MR. DE GEX moved for leave to substitute service of the bill on the solicitor who was acting for the defendant in another cause relating to the same property, in which other cause this defendant was the plaintiff. The defendant was out of the jurisdiction, had not appeared, and could not be found.

Where a defendant was out of the jurisdiction, and had not appeared, but had himself subsequently filed a bill in respect of the same property, the Court gave leave to the plaintiff in this suit to effect substituted service on the solicitor who acted for the defendant as plaintiff in the other suit.

The defendant had granted to the plaintiff an annuity of 507*l.* 8*s.* 3*d.*, charged on certain premises which were also subject to several incumbrances. The annuity having fallen into arrear, the plaintiff filed this bill to enforce payment, but was unable to effect service on the defendant who was out of the jurisdiction. The defendant, however, had himself filed the bill in the other suit, to which the plaintiff was not a party, to redeem incumbrances on the same property as that on which the annuity was secured.

The plaintiff now asked for leave to substitute service on the solicitor who appeared for the defendant as plaintiff in that suit.

The VICE-CHANCELLOR made the order.

The following are some of the authorities on this subject:—

Hope v. Hope (a), *Cooper v. Wood* (b), *Bankier v. Poole* (c), *Hobhouse v. Courtney* (d).

(a) 19 Beav. 237.

(c) 3 De G. & S. 375.

(b) 5 Beav. 391.

(d) 12 Sim. 140.

*Dec. 2, 3, 4,
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SCOTT v. THE CORPORATION OF LIVERPOOL.

[In this case Mr. Justice Erle sat with the Vice-Chancellor.]

Bill for an account of certain works constructed by S. for a corporation, the contract providing that if the contractors should fail in performing their contract, or in the opinion of the engineer not make due progress, it should be lawful for the corporation to seize the plant, and in case any dispute should arise, the decision of the engineers should be final at law and in equity "—Dismissed with costs, no case of fraud, misconduct, incapacity or refusal to act, being established against the engineer.

THIS bill was filed by James Scott and Joseph Nowell against the Corporation of Liverpool and Thomas Hawksly their engineer, praying that an account might be directed of the works done by the plaintiffs for the corporation, and for payment of what, on taking such account, should be found due to the plaintiffs.

The defendant Hawksly demurred to the bill, but the demurrer had been overruled.

Under a Local Act 10 & 11 Vic. c. cclxi. entitled the Liverpool Corporation Waterworks Act, 1847, and two subsequent Acts, the Corporation published a specification of certain works which they required to be done, including the construction of the Rivington reservoir. One condition annexed to the specification was as follows:—The specification provided that in case the work should not be completed by the 1st of January, 1854, or by such other day as should be allowed by the engineer, a certain sum should be paid by the contractors by way of liquidated damages; it then proceeded as follows:—

"The contractor shall truly and satisfactorily complete his undertaking in all its parts on or before the 1st of January, 1854, on which day or on such other day (not being earlier) as may be allowed in writing by the engineer in pursuance of the power hereinafter for that purpose contained, he shall deliver up the said works to the said corporation," &c., "provided always, that if by reason of

any additions to or enlargement of the works (which additions or enlargement the said engineer is hereby authorised to make), or for any other just cause arising with the said corporation, or with the engineer, or his clerk, assistant, or inspector, the contractor shall, in the opinion of the engineer, have been unduly delayed or impeded in the completion of his contract, it shall be lawful for the said engineer to grant from time to time by a writing under his hand such extension of time as to him may seem reasonable, without thereby prejudicing or in any manner affecting the validity of the contract, or the sufficiency of the tender, or the adequacy of the sums or prices therein mentioned; and any and every such extension of time shall be deemed to be in full compensation and satisfaction for and in respect of any and every actual and probable loss or injury sustained or sustainable by the said contractor in the premises, and shall in like manner exonerate him from any claim or demand on the part of the said corporation for and in respect of the delay occasioned by the cause and causes in respect of which any such extension of time shall have been made, but not further or otherwise; and it shall be lawful for the said corporation, in case the said contractor shall fail in the due performance of any part of his undertaking, or shall not, in the opinion and according to the determination of the said engineer, exercise such due diligence and make such due progress as would enable the works to be efficiently completed at the time and in the manner aforesaid, to determine the contract by a notice in writing under the hand of the town clerk, and to enter upon and take possession of the said works and of the plant, tools, and materials of the said contractor, and use or sell the same as the absolute property of the corporation. The plant, tools, and materials provided by the contract shall, in all cases, from the time at which they or any of them may be brought upon the works and land of the corporation, and during the con-

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struction and until the completion of the said works, become and continue the property of the said corporation, and the contractor is hereby prohibited from removing the same or any part thereof during the progress of the works without the consent in writing of the said engineer; and when the contract shall have been so terminated, or so soon thereafter as the engineer may think convenient, the said engineer shall fix and determine what amount (if any) is then reasonable and earned by the contractor in respect of works actually done, and in respect of the value of any materials, implements, and tools provided by the contractor and taken by the corporation; and the amount thereof, after allowing for all sums then already paid to the contractor on account, shall remain in the hands of the corporation without interest until twelve months after the date of the engineer's certificate of the final completion of the works as therein provided; and the said engineer shall be at liberty to authorise by his certificate the said corporation to deduct the damages, losses, costs, charge, and expense in his opinion incurred by them in consequence of the premises, or to which they may be put or liable, together with the forfeitures (if any) incurred by the said contractor from any sum of money which would so become due and owing to the said contractor."

It was further agreed between the parties as follows :—(a)

"And in case of any doubts, disputes, or difference arising touching the said works or any of them, or relating to the quantities, qualities, description, or manner of work done and executed by the said contractor, or in respect to any additions, deductions, alterations, or deviations made in, to, or from the said works or any part of them, or touching or concerning the meaning of this specification," &c., &c., "such doubts, disputes, or differences shall from time to time be referred to and decided by the said engineer, who shall be competent to enter on the subject matter

(a) As to other clauses, see p. 224.

of such doubts, disputes, or differences with or without formal reference or notice to the parties who are concerned or either of them, and who shall decide or determine thereon; and to him, the said engineer, shall also be referred the settlement of the said contract and the determination of the sum or sums and balance of money to be paid to or received from the said contractor by the said corporation; and the directions, decisions, valuations, orders, and awards of the said engineer shall be final and binding upon the corporation and the contractor respectively, and shall not be set aside by reason of any informality, omission, delay, or error of proceeding in or about the same or any of them, or on any ground, or for any pretence, suggestion, charge, or insinuation of fraud, collusion, or confederacy, or otherwise howsoever. And it shall not be competent for the said contractor or the said corporation to except at law or in equity to any hearing or determination before or of the said engineer on the ground of any want of jurisdiction or excess of authority, or irregularity of proceeding or otherwise howsoever. But any and all matters made the subject of any such hearing or determination, or included in any certificate, order, or award, shall be held and deemed both at law and in equity to have been properly adjudicated upon; nor shall the said engineer be made party to or required to answer or defend any such bill or proceeding at law or in equity at the instance of the corporation or of the said contractor; nor shall the said engineer be compellable by any proceeding whatever, either at law or in equity, to answer or explain any matter touching or relating to any certificate or award made by him, or to state or show why or upon what grounds he settled or determined, or omitted to settle or determine any matter whatsoever. And neither the contractor nor the said corporation shall have any power or authority to revoke, annul, or interfere with the power and authority of the said engineer. And if either party shall, in the

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opinion of the said engineer, attempt so to do, or to hinder the said engineer from making any certificate, order, or award, it shall be lawful for the said engineer, if he shall see fit, to proceed *ex parte*, and any certificate, order, or award which may be made by him thereafter shall be final and binding on the parties, notwithstanding any attempted revocation by either of them or otherwise."

In 1851 the plaintiffs sent in a tender to execute the proposed works for the sum of 56,662*l.* 8*s.* 8*d.*, which the defendants accepted, and a contract was entered into, dated the 6th of November, 1851, by which the plaintiffs agreed to construct the works, and to observe all the matters and things mentioned in the specification upon their part to be observed and performed.

The plaintiffs commenced the works and carried them on for some time, but not to the satisfaction of the defendants, who, shortly prior to February, 1855, passed a resolution at a meeting of the town council that the plaintiffs had failed duly to perform their contract, and according to the decision of Mr. Hawksly the engineer, had not exercised such due diligence or made such progress as to enable the works comprised in the said undertaking to be efficiently completed.

On the 28th of February, 1855, the defendants served on the plaintiffs the following notice signed by the town clerk:—

"I do hereby give you further notice that the said corporation have determined and do hereby determine the said contract in the said resolution mentioned, and will forthwith enter upon and take possession of the works therein mentioned, and of the plant, tools, and materials of you the contractors, and use or sell the same as the absolute property of the said corporation." In pursuance of this the corporation took possession of the works, the plant, tools, materials, &c., which were the property of the plaintiffs.

The plaintiff thereupon filed his bill, alleging that in consequence of the alterations which the defendants or their

engineer had made in the specification, they were obliged to have the time extended within which the works were to have been completed.

The bill alleged that the defendants had paid the plaintiffs various sums on account, amounting to about 50,000*l.*, on certificates given to the plaintiffs by the engineer of the amount payable from time to time under the said specification and contract, but that the engineer made and delivered such certificate at irregular times, and did not include therein all the works which ought to have been included, and sometimes refused to give a certificate of the amount justly payable in respect of work done since the delivery of the preceding certificates, thereby preventing them from obtaining payment of the sums to which they were justly entitled.

The bill prayed that it might be declared that the withholding the certificates as aforesaid was a fraud on the plaintiffs, and that the plaintiffs were entitled to such sums of money as they would have been entitled to if such certificates had been duly granted. That an account might be taken of the works done by the defendants since the date of the last certificate, including all *extra* additional or substituted work, and of the amount due to the plaintiffs in respect thereof, and that the defendants might be ordered to pay such amount.

Mr. *Malins*, Mr. *Collier*, and Mr. *Karslake*,* for the plaintiffs.

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The evidence showed that the engineer had refused reasonable indulgence to the plaintiffs, had vexatiously delayed the plaintiffs, and had capriciously withheld the certificate. It was submitted, therefore, that this was conduct against which this Court would relieve the plaintiffs, notwithstanding the stipulation contained in the contract.

A condition that matters between two different parties should be left to the discretion of a third, did not relieve

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that third party from the obligation of exercising a reasonable discretion.

In *Macintosh v. The Great Western Railway Company* (a), where there was a condition similar to that in this case, the Court notwithstanding held the plaintiffs entitled to an account.

Mr. Bacon, Mr. Knowles, Mr. Hawkins, Mr. Roweclyff, and Mr. Milward, for the defendants.

The evidence showed that the engineer had fairly and honestly exercised his discretion, and the plaintiffs therefore were not entitled to relief in this Court.

The condition by which all parties agreed to be bound by the decision of the engineer is the ordinary one, and is valid both at law and in equity. In order to entitle the plaintiffs to relief, it is necessary that they should show fraud or collusion on the part of the engineer, and that they had failed to show.

In *Grafton v. The Eastern Counties Railway Company* (b), it was held that a condition that the agent must be satisfied before the plaintiff should be liable, was a valid contract. In *Milner v. Field* (c), the same doctrine was laid down. In *Ranger v. The Great Western Railway Company* (d), the stipulation that the engineer should be absolute judge was held valid, though the engineer was a shareholder in the company; and in pp. 106, 107 of the report, a claim that the account might be taken by this Court, on the ground of a variation of the contract, was repudiated.

On the whole, it was submitted that there being no case of fraud or misconduct on the part of the engineer, and the contract being valid at law, the bill must be dismissed with costs.

The following cases were also cited:—*Hotham v. The*

(a) 3 Sm. & G. 146.

(b) 8 Ex. 699.

(c) 5 Ex. 829.

(d) 5 Ho. of Lds. Ca. 72.

East India Company (a), *Thompson v. Charnock* (b),
Milnes v. Gery (c).

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The VICE-CHANCELLOR requested the opinion of Mr. Justice Erle, on the question, whether upon the terms of the contract, and the evidence as to the conduct of the parties, and the execution of the works, the learned judge, on a trial at law, would have directed the jury to find a verdict for the plaintiff.

MR. JUSTICE ERLE delivered the following opinion:—

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To the question of his Honour the Vice-Chancellor, whether, upon the terms of the contract, and the evidence, of the course of conduct of the parties to the contract in regard to the execution of the works, the case is one in which, if tried at law, the jury would be directed to find a verdict for the plaintiff, my answer is in the negative. I think there is no evidence to support a claim by the plaintiff to recover anything either in respect of the work done, and the materials supplied before the 28th of February, 1855, or of the plant taken by the defendants on that day, when the contract was lawfully determined. The question refers to the contract and to the course of conduct of the parties thereto, and I would propose to consider first, the rights under the contract, and secondly, the effect of the conduct of the parties. By the contract, it appears to me that the engineer is interposed between the corporation and the contractors, and made the absolute judge of the performance of the works, and that there is no right in the contractors to demand payment, and no liability on the corporation to pay throughout the contract, unless the condition of obtaining a valuation by the engineer, and his certificate, has been fulfilled. I pass over with the mere mention, the clause giving to the engineer his powers in respect of the works, such as the absolute discretion over alterations and additions, and the valua-

(a) 1 T. R. 638.

(c) 14 Ves. 400.

(b) 8 T. R. 130.

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tion of them, and the power to inspect and reject materials and workmanship, and to suspend or delay the progress of any part of the works, and to settle about the extension of time, and I come to the clauses regulating the contractors' rights to demand payment. The parties provide first for paying instalments during the progress of the works, and the balance on the final completion: and secondly, for compensating for the works and the plant taken, in case the contract should be determined before completion. In the first case, that is if the works progress to completion, then the stipulation for the certificate is express. In paragraph 34, it is provided "that no sum or sums of money should be considered to be due and owing, nor shall the contractor make any claim against, or demand upon the said corporation for, or on account of any works executed by him, unless the said engineer shall certify the amount thereof, and that the said contractor is reasonably entitled to such instalments or balance respectively."

This clause comprises every right to payment, except in case of termination of the contract, and makes every right universally conditional upon obtaining the engineer's certificate. Then with respect to the clauses for determining the contract in paragraph 33, it is provided, "that if the contractors should not in the opinion, and according to the determination of the engineer exercise due diligence as there described, the corporation may determine the contract and enter upon the works, and take possession of the plant of the contractors as the absolute property of the corporation." Then follows the express provision defining the right of the parties in respect of such work and such plant:—"When the contract shall have been so determined, or as soon thereafter as the engineer may think convenient, the engineer shall fix and determine what amount, if any, is reasonably earned by the contractor in respect to work actually done, and in respect to the value of any materials, implements, and tools (that

is, plant), provided by the contractor and taken by the corporation; and the amount thereof, after allowing for all sums then already paid to the contractor, shall remain in the hands of the corporation until twelve months after the engineer's certificate of the final completion of the works; and the engineer may by his certificate authorize deduction therefrom for losses, forfeitures." Thus the contractors stipulate that the corporation shall be liable only to the amount which the engineer shall fix for work done; the plant taken at the termination of the contract is liable therefore to nothing until an amount is so fixed, and then only subject to the term for the deductions and the delay above specified. The contract gave to the corporation the right to terminate it, and made it liable to make the payments in the manner specified. The contract also made the contractors liable to such a termination, and gave to them the right to the payment in the manner specified. The contract expressly defines the right of the parties in the event that has happened, and the law can only enforce rights under a contract according to that contract. It is not necessary to cite authorities on such a point. I refer only to some of those cited in the argument. In *Grafton v. The Eastern Counties Railway Company* (a), the contract was to deliver to the satisfaction of the agent of the defendants. It was held that the promise was on condition that the agent was satisfied, and that no action lay for the price of coke, unless the condition was fulfilled. So in *Milner v. Field* (b), the same point prevailed. In *Ranger v. The Great Western Railway Company* (c), the stipulation that the engineer should be the absolute judge during the progress of the works of the mode in which the contractor was discharging his duties, was recognised as both valid and reasonable, though the engineer

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(a) 8 Exch. 699.

(c) 5 Ho. of Lds. Ca. 73.

(b) 5 *Ibid.* 829.

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was a shareholder in the company; and in pp. 106, 107 of the report, the notion that accounts of the work done under a similar contract to this, might be taken by the Master in Chancery, instead of the engineer, on the ground that the contract has been abandoned, was repudiated as erroneous. The stipulation is of great importance, for if the contractors can open this contract on account of alterations and additions with mutual disputes, and can insist that an account should now be taken before a stranger of the entire works, which can ill be examined after completion, they may inflict litigation, complicated, expensive, and doubtful in the extreme—an evil which the stipulation is framed to avert. The question remains, whether the conduct of the parties affords any evidence of a right of action, either on the ground of waiving the conditions, or departing from the original contract, and substituting another, either expressed or implied, or on the ground of a wrong. My answer is in the negative. I am not aware that the defendants are shown to have committed any wrong or any breach of their contract, or any departure from it. The complaints of the plaintiff against the engineer in respect of the extension of the time, and the vexation, delays, and of withholding certificates for payment, and the like, relate all of them to matters left to the discretion of the engineer, and if the decision of the engineer was unsatisfactory to the plaintiff, it was no breach of contract. At the same time it should be observed that the evidence on the other side is at least equally strong to show that the plaintiffs were wanting in ability for the contract, and that the engineer did his duties to the corporation in resisting them. I take the result of the evidence to be, that the engineer was and is able and willing to do all the duties imposed on him by the contract, and not incapacitated by collusion, corruption or otherwise. It is possible that the plaintiffs may object to his arbitration, because he knows the truth, and would decide according to it. But be this as it may, I cannot discover

that the corporation have by their conduct created a liability at law not imposed on them by the terms of the contract. My answer thus far rests upon the contract to pay being conditional, and is entirely independent of the clause for referring all disputes and difference to the final arbitration of the engineer. If the defendants resorted to that course, it appears to me to express an intention, both to refer to the engineer the matters there mentioned, and to exclude other tribunals, and although there are cases against giving effect to the latter part of such an intention, yet later decisions have limited that doctrine. In *Scott v. Avery* (a), such a reference was held to bind to the extent of the instrument then in question. In *Livingston v. Ralli* (b), an action was maintained for refusing to fulfil such an agreement to refer. These decisions are an authority for holding that an agreement to refer a question of amount, and to exclude the jurisdiction of ordinary tribunals till the award should be made, would be valid.

Now, the question between these parties is a question of amount—that is of the amount due for works and materials, and plant for the plaintiff, wishing to have that amount ascertained by a Court, the defendant by the arbitrator named in the contract. I therefore incline to think that the defendants could, if necessary, make a further valid defence to an action for this amount on the arbitration clause.

The VICE-CHANCELLOR:—

This case was heard before me with the assistance of Mr. Justice Erle. The opinion delivered by that very learned judge is entirely unfavourable to the right of the plaintiff to any relief in the Court of Law, and there is no doubt whatever in my mind as to the soundness of that

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(a) 5 Ho. of Lds. Ca. 811.

(b) 5 Ell. & Bl. 132.

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opinion. There remains therefore only the question, whether there are any circumstances to entitle the plaintiff to relief in a Court of Equity? What is asked on behalf of the plaintiffs is an account of the works executed by them under the contract since the date of the last certificate, and payment of what may be found due in respect of them. As to the relief prayed upon the ground of improper conduct upon the part of the defendant Hawksly, the engineer, in withholding certificates of work done, the case of the plaintiff has wholly failed on the evidence. It has also entirely failed as to the allegation that the plaintiffs were prevented from properly performing the contract, and executing the works, by the act and default of the engineer. This is not a case in which there has been on both sides, or on either side, such a course of conduct as amounts to the substitution of some other term of agreement. The stipulations in this contract are of the most stringent kind, and expressed in very clear language. All the complaints as to delays of a vexatious kind in withholding certificates, relate to matters which by the contract are left to the absolute discretion of the engineer. This Court has no right or power to impose upon either of the parties to the contract any other terms than those which have been prescribed by themselves, and by which they have agreed to be bound. It is of the very essence of the contract, that no sum should be considered due and owing to the plaintiffs on account of any of the works executed by them, unless the engineer shall certify the amounts; and that all his directions and measurements, valuations, and awards shall be final and binding upon both parties to the contract. The bill, indeed, alleges that the engineer has refused to perform his duties, and that he has withheld certificates to which the plaintiffs were justly entitled; and withheld them for the purpose of preventing the plaintiffs from obtaining the amount to which they are entitled.

If the evidence had established a case of gross miscon-

duct in the engineer, or of wilful neglect, refusal, or absolute incapacity in him to perform his duties, the case might have been brought within the jurisdiction of this Court upon that ground. But it is proved by documents and testimony of the clearest kind, that the engineer has acted reasonably and properly in the discharge of his duties. It is shown that he has hitherto been prevented from making a satisfactory award by the plaintiff's own conduct.

The contract expressly requires, as to all extra work for which instructions in writing shall have been given by the engineer or his assistants, that it shall be claimed for in writing by the plaintiffs within the week in which the work is executed, and the materials used, before the same shall be placed out of view, or beyond check and admeasurement. It is satisfactorily proved that the plaintiffs refused, or intentionally neglected to send the engineer the proper weekly claim paper before the work was placed out of view, and out of reach of measurement. It is also proved that the plaintiffs neglected or refused to produce their books and vouchers, so as to enable the engineer to make proper certificates.

So far from any evidence of unreasonable or improper conduct upon the part of the engineer, it is proved that when he was unable, owing to the conduct of the plaintiffs, to make any formal award or certificates satisfactory to himself, he determined upon making a report from time to time for the plaintiffs' convenience, and to enable them to obtain money on account. There is nothing proved on the part of the plaintiff to contradict the clear positive and circumstantial statement supported by letters and other documents in the evidence of the engineer, to show that he discharged his duties honestly, and with a reasonable indulgence towards the plaintiffs so far as was consistent with his duties to the corporation.

It is impossible, therefore, to sanction the view urged by the plaintiff's counsel, that the engineer is disqualified by his conduct from properly proceeding, according to

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the terms of the contract, to decide all the questions which remain to be decided between the plaintiffs and the corporation. It appears that since the institution of this suit, the engineer has offered to proceed to ascertain and settle what remains due as between the plaintiffs and the corporation, if the plaintiffs would attend him for that purpose.

But the plaintiffs refused to accept this offer except upon the terms that the certificate and award of the engineer should not be binding upon them, and should not have the effect given to it by the contract. It appearing that the engineer has never refused to discharge his duties according to the contract, and that he has done nothing to disqualify himself, but is still ready and willing to proceed to decide all matters between the plaintiffs and the corporation according to the contract, there remains no ground whatever for the equitable interference of the Court.

The stipulations of the contract are binding upon the plaintiffs and the defendants, and the bill must be dismissed with costs against both the defendants.

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THESE causes came on, on bill and cross bill.

Where, under the pretence that it was a deed of covenant to produce title deeds, a solicitor procured his client to execute a deed of mortgage to himself, to secure payment of an alleged debt, the existence of which debt was not proved, the deed thus fraudulently procured to be executed was held to be false and fictitious, and wholly void; and a bill having been filed by an assignee for valuable consideration, without notice of the fraud, praying for foreclosure, and a cross bill by the alleged mortgagor, the deed was decreed to be delivered up to be cancelled.

John Vorley, farmer, the plaintiff in the original cause, filed his bill against Isaac Cooke, claiming as assignee of a mortgage on Cooke's lands for 780*l.*, by virtue of an

indenture executed by Cooke, dated the 27th of December, 1855, and praying for the ordinary accounts, payment of principal and interest, and in default for foreclosure.

Isaac Cooke, farmer, filed his cross-bill against John Vorley, praying that Vorley might be decreed to deliver up the alleged mortgage deed to be cancelled, &c., and containing the following allegations.

That in December, 1846, Cooke at an auction purchased a part of certain lands in Lincolnshire, for 7700*l.*, on which he paid 770*l.* deposit. As the purchaser of the largest lot, he was entitled to the custody of the title deeds of the whole property.

At the time of the sale, and until July, 1854, the firm of Messrs. Sturton, Key & King, acted as Cooke's solicitors, generally, and in the matter of the purchase. The hereditaments were conveyed to Cooke by an indenture, dated the 1st and 6th of July, 1847, and the title deeds of the property were delivered to Messrs. Sturton, Key & King.

On the 3d of May, 1851, Cooke borrowed of Messrs. Bell & Farrer 5500*l.*, and on the 6th of May, 1851, he borrowed of one Allen 2000*l.*, both of which sums were secured by mortgages of the purchased lands and other lands belonging to Cooke; Messrs. Sturton, Key & King, in this matter acted as solicitors for Cooke. The above sums were borrowed to enable Cooke to pay the residue of the purchase-monies, which he did in June, 1851.

On the 27th of December, 1851 (the date of the alleged mortgage), Key, one of the firm of solicitors, applied to Cooke to execute a deed which he brought with him ready engrossed, representing it to be a deed on behalf of a purchaser at the sale, and containing the usual covenant for the production of the title deeds. Cooke, who had executed numerous deeds of that description, executed it believing the representation made by Key. On the 28th of July, 1854, King, one of the firm, died, when the business

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was carried on for a short time by Messrs. Sturton & Key, until they absconded. On the 19th of February, 1856, they were declared bankrupts. Cooke on the 10th of February received a notice from Vorley, stating that a mortgage of the said hereditaments executed by him (Cooke), bearing date the 27th of December, 1851, had been assigned to Vorley by Messrs. Sturton, Key & King, by an indenture dated the 14th of August, 1855, to secure 780*l.* advanced to them by Vorley; Cooke then for the first time became aware that the indenture dated the 27th of December, 1851, which he had executed on the representation by his solicitors that it was a deed of covenant to produce title deeds, was on the face of it a mortgage in fee (subject to the prior mortgages to Bell, Farrer, and Allen) of the hereditaments which he had purchased, to secure to Messrs. Sturton, Key & King, payment by the 27th of June, 1852, of the sum of 780*l.*, expressed to be due to them from Cooke on the balance of an account that day stated, with interest at five per cent. Cooke in the cross-bill, and in his affidavit, stated that the recitals in the alleged mortgage deed of an agreement by him to execute a mortgage to his solicitors, and of the statement of an account were false; that nothing was due by him to the firm, but that the balance was in his favour; that the deed recited that bills of costs had been delivered, but that no bills of costs had ever been delivered; and that Cooke had never been able to obtain such bills from his solicitor. Vorley, in his answer to the cross-bill, deposed that Sturton and Key who were his solicitors, applied to him to lend them 780*l.* on the security of the pretended mortgage, that he consented, and did in fact lend such sum on the security of the said mortgage deed, and that Key handed to him the deeds of the 27th of December, 1851, and the 14th of August, 1854 (the assignment), stating that he could not give the other deeds, which were in possession of the prior mortgagees.

The answer of Vorley alleged that any one with ordinary caution could have known that the deed of the 27th of December, 1851, was in form a mortgage; and denied all knowledge or suspicion that any fraud had been practised on Cooke.

The only direct evidence of the fraud was Cooke's own testimony, but it was corroborated on several points by collateral evidence.

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Mr. Bacon, and Mr. Schomberg, for the plaintiff Vorley.

Argument.

Cooke was guilty of carelessness, which enabled his solicitor to commit a fraud on the plaintiff Vorley, and in that case this Court would not aid him to get rid of the effect of the deed which he had executed. The principle of this Court is quite clear, that where a person has been guilty of *laches* or neglect, this Court cannot relieve him at the expense of a person less culpable than himself, who is a purchaser for valuable consideration without notice.

In *Waldron v. Sloper* (a), where a mortgagee allowed his security to remain in his mortgagor's hands, who deposited the deed by way of equitable mortgage, such negligent mortgagee was postponed.

In *Rice v. Rice* (b), where the vendor executed the deed, signed the receipt, and delivered the title deeds to the purchaser, who deposited them by way of mortgage, and absconded, the Court held the vendor's lien was postponed.

In *Hiorns v. Holtom* (c), where a first mortgagee was fraudulently, and without consideration, induced by his solicitor to transfer to a third person a mortgage deed which had been executed between the mortgagor and mortgagee, but was treated by both as a nullity, the Court held he had lost his priority.

(a) 1 Drew, 193.

(b) 2 Drew, 73.

(c) 16 Beav. 259.

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Argument.

In this case, if Cooke had read through or even glanced at the deed, he must have known it was a mortgage deed.

Mr. *Malins*, and Mr. *Baggallay*, for Cooke.

Here it is Vorley, who in the first instance is seeking the relief of this Court, against a person who had been fraudulently induced to execute a deed which he had no intention to execute. There is no authority for such a proceeding, and the bill must be dismissed with costs.

The rule indeed is, that if a suitor has been guilty of fraud or wilful negligence, this Court would not relieve him, but no such case exists here. The case here bears more analogy to a case of forgery, as to which it is clear the person whose name has been forged is not bound by the deed (*a*).

(*a*) See *Smith's Leading Cases*, vol. 1, p. 287, as to matter not affecting the solemnities of signing, sealing, and delivering, &c. "With respect to fraud, that has been always considered pleadable as well as illegality, and it is pleadable *only*, and cannot be given in evidence under *non est factum*: *Edwards v. Brown*, 1 C. & Jervis, 307." But it seems otherwise as to matter affecting the actual execution and the solemnities; as if the execution is obtained by falsely reading the deed, &c. See the resolutions in *Thorngood's Case*, Co. Part 2, 435—442.

In *Mason v. Ditchbourne* (1 M. & Rob. 460), the question was designedly raised by a new trial, and distinctly decided. (See *Connop v. Holmes*, 2 C. M. & R. 720; Exchequer, E. T. 1835; Debt, on bond. Plea, that the bond was obtained by the wilful fraud and mis-

representation of the plaintiff, and issue thereon. At trial, evidence was tendered that the plaintiff had fraudulently misrepresented the value of the property to secure the purchase-money of which the bond was given, but such evidence was rejected; and on the argument on the rule for a new trial, the question was, whether such evidence was admissible under the plea, or whether the defendant was confined at law to evidence of fraud in the concoction or execution of the bond itself. The Court sent the case to a new trial in order that the question might be more distinctly raised, and the evidence being received, the verdict was thereupon found for the plaintiff. There was no question as to the genuineness of the bond, or that the testator was deceived as to its contents.

The VICE-CHANCELLOR :—

The original bill is filed by the assignee of a mortgagee who paid his money and took his security without the concurrence or knowledge of the alleged mortgagor, and without holding any communication with him.

The alleged mortgagor has also filed a cross-bill impeaching the alleged mortgage as wholly void, it having been obtained by deception, and his execution of it obtained by a fraudulent contrivance and misrepresentation of its contents. If the deed is wholly void, no estate could pass by it. It appears that he never agreed or intended to execute such security, and that the persons described in it as mortgagees were his own solicitors. This deed was prepared by the solicitors and placed before him for execution, on the representation that it was a mere deed of covenant to produce the title deeds of certain property pursuant to the conditions of sale on which he had purchased.

There is some difficulty as to the evidence, inasmuch as the only direct proof of the fraud on the alleged mortgagor is his own testimony that he executed the deed relying on the representation of his own solicitor, that it was simply a deed of covenant for the production of title deeds. The legislature has made the statement on oath of a plaintiff admissible evidence, and I am bound to receive and act upon it, but I feel, as I believe every other judge must feel, the difficulty of adjudicating on a case where the only evidence is that of the principal party to the cause. In such cases it is the duty of the Court to examine narrowly all the collateral circumstances that may serve to test the evidence of the party concerned, in order to ascertain how far such evidence can be relied on.

The plaintiff has sworn in the plainest and most positive terms to the truth of the case made by his bill, and so far from there being anything to impugn his statement, it is materially corroborated by other circumstances.

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The plaintiff swears that he was invited by his solicitor to go to a particular place for the purpose of executing a deed of covenant for the production of the title deeds, of which he had executed many, all prepared by the same solicitor; and in reply to a question, he was informed that this was the last of those deeds. There is no evidence to show that his solicitor had ever applied to him to execute a mortgage for any sum due by him to the solicitor, or that any sum was due by him to the solicitor. It is necessary that those who rely on the alleged mortgage should establish this part of the case by the clearest evidence, because the Court always regards with jealousy a mortgage transaction between a client and his solicitor, more especially where there is no intervention of any person to protect the interests of the client.

If the solemnities of signing, sealing, and delivering are tainted with imposture and deceit, these solemnities cease to have a binding effect; and the instrument to which they have been fraudulently applied cannot be the act and deed of him who had no mind or intention to execute such an instrument, and who applied these solemnities on a false representation of the nature of the deed, and with the mind and intention to execute a deed of a different kind and for a different purpose from that which by deceit and fraud was substituted. Therefore it is that evidence of the imposture, falsehood, and fraud of such a description can be given at law under the plea *non est factum*, for the instrument is no more a genuine deed than if the signature had been forged.

Upon the whole, this is a case in which the alleged mortgage deed is a false and fictitious instrument, and wholly void. There was no such mortgage, and no intention or representation that any mortgage was intended, but, on the contrary, that it was a deed of an entirely different kind. It cannot be said that Cooke's conduct was careless or rash. He was deceived, as any one with

the ordinary amount of intelligence and caution would have been deceived, and he is therefore entitled to be relieved.

Ordered that the first-mentioned cause do stand dismissed out of court and (the defendant Cooke by his counsel consenting thereto) without costs. And it is ordered that John Vorley, the defendant in the second mentioned cause, do deliver up to Isaac Cooke, the plaintiff in the said cause, the indenture dated 27th December, 1851, to be cancelled. And this Court doth not think fit to give any costs of the said second mentioned cause.

Reg. Lib. B. 144 (13th November, 1857).

NOTE.—The distinction is between instruments that are void and those that are only voidable. Where by fraudulent contrivance one is procured to put his hand and seal to an instrument which he never intended to execute, and would not have executed if he had known its real nature or contents, this may be given in evidence under the plea *non est factum*, as there was no mind or intention to execute any such deed. See *Starkie on Evidence*, 2d ed. p. 273, and authors there cited.

Thus, a man intending to execute a covenant to produce title

deeds and putting his hand and seal to a deed fraudulently read over to him, or represented to him as being a covenant to produce, when in fact it was a money bond or a mortgage, the execution is as fictitious as in the case of forgery, and there being no mind or intention to execute, the proper plea is *non est factum*, the whole transaction being a cheat and imposition.

A man who is cheated into the execution of a deed which is fictitious, is no more bound by it than if it were a forgery.

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Nov. 9.

PARISH *v.* SLEEMAN.

"Lease for the term of fourteen years, at the yearly rent of 40*l.*, payable quarterly, free of all outgoings"
—*Held*, not sufficient to relieve the lessor from payment of the land tax and tithe commutation.

MR. SPEED, on behalf of the defendant, moved to vary the chief clerk's certificate, whereby he had settled the terms of a lease of the farm in the bill mentioned by imposing on the landlord the payment of the amount of tithe commutation, and the land tax.

On the 3d of October, 1859, the plaintiff entered into an agreement with a Mr. Pattison, who had subsequently sold the property which formed the subject of the agreement, for the lease of Tinnye farm. The agreement was as follows:—

"The undersigned Samuel Rowles Pattison, as landlord, hereby agrees to let, and the undersigned Joseph Parish to take, as tenant, all that farm in and called Tinnye, in the parish of Bridgerule, late in occupation of Thomas Leigh, and now of the said landlord, for a term of fourteen years from Lady Day next, determinable at the end of the first seven years thereof, at the yearly rent of 40*l.*, payable quarterly, free of all outgoings; the landlord to abate 5*l.* per annum of the rent for the first two years in consideration of the present condition of the place, and to put the said farm into repair forthwith; and the tenant to keep the same in repair when so put, and to cultivate and manure the ground according to the rules of good husbandry, and not to sell or carry off any of the straw or hay, or manure during the term, or at the end thereof, and at the proper season before the end of the term to allow the landlord or his in-coming tenant, without compensation, to prepare and till any ground, not exceeding six acres, in proper course of wheat. The landlord to drain all ground required to be drained by the tenant, and

to erect new fences where required, for the outlay on which draining and fencing the tenant is to pay 5*l.* per centum as additional rent. The landlord reserves the right of planting, without further charge, not exceeding four acres of the moor, and will fill up the present orchard with fruit trees. The fences at present required and ordered, namely, between the hams, and general repair of the present fences, not to be chargeable with interest. The tenant to take at a valuation, to be made by Mr. Wickett (or such arbitrator as shall be chosen in the usual way), the corn and hay in the mowhay, and the crops and preparation in the ground; to have immediate possession, subject to the residue of the summering of the cattle now taken in, and to pay all outgoings from Michaelmas; and to pay for possession between this and Lady-day next, such sum in respect of rent as Mr. Wickett shall name.

“The said parties agree to grant and accept a lease on the above and other usual terms.

“Dated the 3d day of October, One thousand eight hundred and fifty-one.

(Signed) “S. R. PATTISON.

“The mark of + JOSEPH PARISH.”

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Disputes having arisen between the parties, the plaintiff filed a bill for specific performance of the agreement, and in due course obtained a decree for specific performance of the agreement, and a reference was directed to chambers in the usual manner to settle the conveyance. The chief clerk in pursuance of the decree, approved of the conveyance, on the terms of the landlord (the defendant) paying the tithe commutation, and the land tax.

The defendant thereupon moved to vary the certificate.

Mr. *Speed*, for the motion.

In construing an agreement the Court would endeavour to give effect to every part of it. Here the language

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was that the rent was to be paid free of all outgoings, which was equivalent to saying that the clear net annual rental should be 40*l.* But where the contract was for a lease at a certain net rent upon usual and common covenants, it was held that the tenant was bound to covenant for payment of land tax and sewers rates: *Bennet v. Womack* (a).

Argument.
 —

Mr. *Hobhouse*, for the plaintiff (the tenant).—It is admitted that charges on land could not come under the words “free of all outgoings,” but it was impossible on principle to distinguish these from tithe and land tax. The land tax was in terms imposed on the land itself, and by the 80th section of the Tithe Commutation Act the payment of it was thrown on the owner of the land. Both these charges were imposed, not on the occupier, but on the owner of the land, and were properly payable by him. It might as well be contended that the tenant was bound to pay the property tax. *Bennett v. Womack* (b) was a case between assignor and assignee of a lease, but had it been between landlord and tenant it would seem from the observations of Mr. Justice Bailey it might have been decided differently (c).

Mr. *Speed*, in reply.—The result of the construction contended for would give no effect at all to the words “free of all outgoings,” because unless it was applicable to charges previously payable by the landlord, the clause would be nugatory.

The property tax was made payable by the landlord, by express enactment.

Mr. Justice Bailey’s observations as to the parties between whom the question arose applied to the first objection, and not to the question what was a tenant. *Parker v. Taswell* (d) was cited.

(a) 7 B. & C. 627.

(b) *Ibid.*

(c) *Ibid.* 629.

(d) 2 De G. & J. 559.

The VICE-CHANCELLOR :—

The question must be decided on the language of the agreement, and the words “ free of all outgoings ” are not enough to relieve the landlord from payment of the land-tax and tithe rentcharge. They are charges imposed on the landlord, and are in no sense outgoings from the subject matter of the demise, but are express charges on the freehold, and not on the term or the occupier under the lease. The chief clerk’s view is, therefore, the correct view, and as the motion has substantially failed it must be refused with costs.

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Judgment.

On appeal, the Lord Chancellor (Campbell), reversing the decree, decided that the tenant should pay the land tax and tithe rentcharge.

In *Parker v. Taswell*, the Lord Chancellor (Chelmsford) decided that in the absence of any stipulation on the subject the tithe rentcharge should be paid by the landlord.

RAYNE v. BAKER.

Nov. 23.

THIS was a bill by an equitable mortgagee against the assignees in bankruptcy of his mortgagor, and against a purchaser from the mortgagor, praying for an account of what was due on the plaintiff’s several securities for principal, interest, and costs, and for payment of what should be found due, or in default that the mortgaged premises, including the six-acre field, might be sold, &c., &c.

A purchaser, between whom and his vendor there were unsettled accounts, agreed to purchase Black Acre, and paid part of the purchase-money, but made no

appropriation of the balance due to him by way of satisfaction of the residue, and allowed the vendor to retain the title deeds, who deposited them by way of equitable mortgage, without notice, and afterwards became bankrupt.—*Held*, that the mortgagee was entitled to priority to the extent of the unpaid purchase-money.

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There were three mortgages, but that comprising the six-acre field was alone in question.

On the 3d of June, 1841, the plaintiff advanced to Nicholas Andrews, then in partnership with his son at Gateshead as ironmonger, 300*l.* on the security of his promissory note, and on the deposit of the title deeds of two freehold houses in Charles Street, Gateshead.

On the 12th of November, 1851, the plaintiff advanced to the said Nicholas Andrews the further sum of 600*l.* on the security of his promissory note, and on the deposit of three deeds of allotment or conveyance of a plot of land at Low Teams, Bensham, in Gateshead, called the six-acre field.

On the 25th of June, 1853, the plaintiff advanced to the said Nicholas Andrews the further sum of 300*l.* on the security of his bond for that amount, and on the deposit of the title deeds of two freehold houses in Sunderland Street.

There was some conflict as to when notice was given to Pearson of the plaintiff's claim—the plaintiff's witnesses deposing it was on the 14th of March, 1854, the defendant in his answer alleging it was September or October, 1855.

On the 3d of December, 1855, Nicholas Andrews was declared bankrupt, and the defendants Baker and Vernon were appointed his assignees.

The assignees of the bankrupt admitted the plaintiff's title, but the defendant Pearson claimed to be a purchaser of the six-acre field without notice of the plaintiff's mortgage.

Pearson, by his answer, alleged that on the 1st of May, 1845, articles of agreement were made between Andrews of the one part and Pearson of the other part, whereby Andrews covenanted and agreed with the said Pearson that in case he, the said Pearson, should pay to the said Andrews, his executors, administrators, or assigns, 2200*l.*

in manner following, viz., 1200*l.* on the 1st of May, 1852, and the remaining sum of 1200*l.* on the 1st of May, 1855, with interest at 4*l.* per cent. on the whole sum, or on the unpaid balance, that he, Andrews, would convey to the said Pearson the six-acre field free from all incumbrances; and that, until default should be made in payment of the said principal and interest monies or some part thereof, it should be lawful for him, his heirs and assigns, to occupy and hold the premises covenanted to be released and conveyed for his and their own use; and that in the said articles of agreement was contained a covenant by Pearson for payment of the said 2200*l.*, together with interest for the same on the days mentioned; and that in case the principal sum and interest should, at any time during the continuance of that security, happen to be in arrear and unpaid for thirty days next after the same should become due and payable, then and so often as the same should happen it should be lawful for the said Andrews, his heirs or assigns, to sell the said premises, and the money to arise from such sale should, in the first place, be applied to pay the costs of such sales, in the next, in payment of the principal and interest monies expressed to be thereby secured, or so much thereof respectively as should then remain unpaid, and all costs incurred in or about enforcing payment of the said principal monies, or of any part thereof respectively, and that the surplus should be paid to him, his heirs and assigns.

Pearson, by his answer, further alleged that immediately on the execution of the agreement he entered into possession of the six-acre field and other premises included in the agreement, and ever since continued in possession thereof. That, previously to the date of the agreement, he had been employed by Andrews as a builder down to the end of the year 1855, and for some time afterwards, that during that period there were cash dealings between them, and a general annual account, including such cash

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dealings, and the said purchase-money and interest, and the monies from time to time owing to him by Andrews in respect of his employment as a builder; and that in 1848 the money due from him in respect of such purchase-money and interest was, by means of the money due to him, reduced to about 1300*l.*, and that he therefore applied to Andrews to execute to him a legal conveyance of a portion of the hereditaments comprised in the said agreement. And that Andrews accordingly, by an indenture dated the 12th of April, 1848, conveyed to him all the said premises, except the six-acre field, comprised in the said agreement, the consideration being expressed to be 950*l.* That the account current was continued after the date of such conveyance, and that at the end of 1852 was in his favour, and was not diminished, but continued to increase till May, 1855, the time appointed for the payment of the last instalment of the purchase-money. That until the date of the conveyance to him of the six-acre field, at which time the whole 2200*l.* was fully satisfied, and a balance due to him from Andrews, he repeatedly, through his solicitor and by himself, but without success, applied to Andrews for the deeds relating to the six-acre field, that they might be examined, until September or October, 1855, when, for the first time, Andrews told him they were deposited with the plaintiff to secure 300*l.* That on applying to the plaintiff, he told him the title deeds were deposited to secure 600*l.*; that he thereupon applied to his solicitor, and thereupon procured the conveyance to him of the six-acre field, to be executed by Andrews and his wife, and that such deed was dated the 16th November, 1855, and thereby reciting, *inter alia*, the said agreement of the 1st May, 1845, and the previous conveyance, in consideration of the sum of 950*l.* it was witnessed that in consideration of 1250*l.* expressed to be paid by him to Andrews, which with the 950*l.* made up the purchase-money of 2200*l.*, the said Andrews and

Mary Anne his wife conveyed the six-acre field, with the appurtenances, unto and to the use of him, his heirs and assigns for ever. That the whole of the purchase-money of 2200*l.* and interest were duly paid or satisfied in manner aforesaid, before he had any notice of the title deeds and documents relating to the said six-acre field being deposited with the plaintiff; that he was a purchaser of the six-acre field for full and valuable consideration, without notice of any claim to or upon the said six-acre field by the plaintiff, by virtue of the deposit of the said title deeds and documents.

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It appeared from the evidence that on Andrews' bankruptcy the defendant Pearson filed an account in bankruptcy with a view to prove for 507*l.* 1*s.* 8½*d.* This account showed a balance due from him to Andrews down to the 31st December, 1855, of 1003*l.* 18*s.* 3½*d.*, in respect of the purchase-money, debiting himself with interest on the balance down to the 11th November, 1855. Against this was brought in the note for 911*l.*, and an item as follows: "Charge upon Low Teams property, 600*l.*"

Pearson's books were also produced, from which it appeared that neither the 2200*l.* purchase-money nor the note for 911*l.* was brought into account, except in the "current ledger" from 1853 to 1858, in which Pearson debited himself with interest on the balance of his unpaid purchase-money down to the 11th November, 1855, and at the foot the promissory note for 911*l.*, and the plaintiff's charge of 600*l.*

The defendant Pearson by his answer set forth an account that differed from those contained in his books, and bringing the note for 911*l.* into account under the date after 30th June, 1852.

In his answer to the amended bill, he alleged that he entered the plaintiff's charge for 600*l.* under the belief he was only entitled subject to the plaintiff's claim; and he alleged that the accounts in bankruptcy were made out erroneously, but that that contained in the answer was correct.

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The bill charged that the whole purchase-money was not paid until after Pearson had received notice of the plaintiff's claim. The bill also averred that for the note for 911*l.* no consideration had been given; but this part of the case was not pressed.

Mr. *Malins* and Mr. *Hallett* for the plaintiff.

The evidence showed that the remainder of the purchase-money had not been paid, if paid at all, until after Pearson had received notice of the plaintiff's claim.

In *Tourville v. Naish* (a), where the purchaser paid part of the price, and gave a bond for the remainder, but before payment of it received notice of an equitable incumbrance, it was held that the notice, though after the bond, was sufficient. Though a purchaser knew not of an incumbrance before he paid his money, yet if he knew of it before the deed was executed, it affects him with notice: *Wigg v. Wigg* (b).

In *More v. Mahow* (c) it was laid down that if a purchaser after articles, but before or at the execution of, the conveyance, received notice of an incumbrance, it would defeat the title of the purchaser.

It was not enough for the purchaser to deny notice, on or before, executing the deed he must go on to aver that he had no notice at or before the payment of the purchase-money: *Story v. Lord Windsor* (d).

Argument.

Mr. *Bacon* and Mr. *Dickinson*, for the defendant Pearson, contended that before the defendant received notice, the whole of the purchase-money had been paid or satisfied, on an adjustment of the accounts. The cases

(a) 3 P. Wms. 306.

(b) 1 Atk. 382.

(c) Freeman (by Hovenden), 175;

s. c. 1 Cases in Chanc. 34;

1 Eq. Cas. Abr. 38, 334.

(d) 2 Atk. 630.

cited, therefore, had no application, and the bill must be dismissed (a).

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Judgment.

The assignees did not appear.

The VICE-CHANCELLOR:—

So long as any part of the purchase-money was unpaid, the vendor Andrews had an equitable interest in the estate.

Whatever equitable interest the vendor had, by his depositing the title deeds by way of equitable mortgage, would pass to that equitable mortgagee. The plaintiff here sues as equitable mortgagee to assert against the purchaser his right to the extent of the unpaid purchase-money.

The only questions are, whether the purchaser can say that he has paid the whole purchase-money, and if he did, whether he paid it before notice. He endeavours to make out that he paid it by an appropriation of a debt on a bill of exchange payable to him by the vendor.

Even if such an appropriation were made out, in order that it should prevail against the equitable mortgagee of the title deeds, it must have been made before the purchaser had notice of the equitable lien. But the books of the purchaser prove that no such appropriation was made before or at the date of the conveyance. The entries in the books are conclusive against any appropriation before or after the conveyance.

This is decisive as to the defence on the ground of payment, and the plaintiff is entitled to a decree against the purchaser.

(a) See *Harrison v. Southcote*, *Nicholls*, 3 Atk. 304.
1 Atk. 538; *Hardingham v.*

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CURZON v. CURZON.

A clause of forfeiture of income given to the separate use of a married woman, which was to take effect on her becoming entitled to, or in the receipt of a permanent income of 1000*l* a year. *Held*, not brought into operation by the accruing to her of an income exceeding that amount which, by the trusts of her marriage settlement, made prior to the will, passed to her husband for life, remainder to the wife for life, remainder to the children of the marriage.

ADMIRAL CURZON, by his will, dated the 28th of September, 1841, gave all his stock in the Three per Cent. Consolidated Bank Annuities, amounting to 34,005*l*. 16*s*. 3*d*., and all other his real and personal estate whatsoever, unto his nephew Captain Curzon, R.N., and the Rev. Alfred Curzon, and Robert Holden, their heirs, executors, &c., upon trust, *inter alia*, to pay the dividends of one eighth part of the said stock, which, as it then stood, was about 4250*l*. 14*s*. 6*d*., to every one of the eight following persons, or their assigns:—"Viscountess Tamworth, Edward Curzon, Frederick Curzon, Alfred Curzon, Francis Curzon, Felicia Curzon, Mary Beaumont, widow of the late John Beaumont, Esq., and Caroline Holden, wife of William Holden, Esq., sons and daughters of the late Lord Scarsdale, for and during the terms of their lives, by half-yearly payments, as the same shall become due; and upon further trust that upon the death of every one of the afore-named eight persons, my nephews and nieces, the dividends allotted to such deceased while living shall, in future, be divided equally among such of my said eight nephews and nieces who shall survive, for their lives, and when one only shall survive, shall be paid to such surviving one for his or her life, but subject to the following provision, that if any such deceased nephew shall leave a widow him surviving, then such dividends as would have been paid to such deceased, either originally or by the death of any one or more of my said eight nephews and nieces if he had continued alive, shall be paid to the widow of such deceased during her life or widowhood; and after her decease or marriage, or if such nephew should not leave a widow, then after his own decease the share of stock to which such nephew,

if any, would be entitled, shall be held in trust for all the children of such nephew as shall attain twenty-one years. And provided also, that after the decease of any of my said nieces, leaving a child or children, the share of stock of which such niece, if living, would, under this my will, from time to time, be entitled to receive the dividends, whether originally or accruing by decease, shall be held in trust for all the children of such niece who shall attain twenty-one, and shall be divided between the said children, if more than one, equally, as tenants in common, and if there shall be but one such child, then the whole to be in trust for that one child on attaining the age of twenty-one years; and until the whole of the said stock shall become absolutely vested in such child or children as aforesaid, it is my will that the said trustee, trustees, or trustee for the time being, shall be at liberty, at their or his own discretion (but not so as to deprive any person to whom an interest for life is hereby given of such his or her interest), to pay the whole or a competent part of the dividends of the same stock, or of so much, or such part thereof, as shall not for the time being have become absolutely vested for the benefit of all and every the children and child for the time being hereby entitled thereto, in expectancy for his or her maintenance and education or benefit And I declare that the dispositions hereinbefore made to females and for female children are for their respective separate benefits, independent of any of their husbands, and that the receipt of such females respectively, shall, notwithstanding their coverture, be sufficient discharge for all monies payable to them under this my will.

“ Provided also, and I hereby declare it to be my intention that if and when any of my before-mentioned nephews or nieces shall be in the receipt of or entitled to a permanent income of 1000*l.* per annum or upwards, whether the same be issuing out of lands, Parliamentary stocks, or funds, or to be otherwise secured, then the interest under

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this my will of such nephew and of his widow, children, and child shall cease to all intents and purposes as if he were actually dead without leaving a widow and without having had a child; and the interest of such niece and her children and child under this my will shall cease to all intents and purposes as if she were actually dead without having had any child, and the share of such stock to which he or she would otherwise be entitled, shall be held upon the same trusts as are herein declared of the same in the event of any such nephew dying without leaving a widow or child and any such niece dying without a child, and if any one or more of the children of my before-mentioned nephews or nieces, before he, she, or they shall have attained the age of twenty-one years, shall be in the receipt of or entitled to a permanent income of 400*l.* a year or upwards, whether the same shall be issuing out of lands, Parliamentary stock, or funds, or be otherwise secured, then the interest of such children respectively so becoming entitled shall cease as if they had respectively actually died under twenty-one years of age, and the share of stock to which they would otherwise be entitled, shall be held upon the like trusts as such share would, under this my will, be subject to if such children respectively had died under twenty-one years of age. And to prevent any dispute as to any of my said nephews, nieces, or any of their children being in the receipt of or becoming entitled to such permanent income of 1000*l.* and 400*l.* per annum respectively as aforesaid, I hereby declare and direct that the decision of the trustees or trustee for the time being acting under this my will shall be final and conclusive to all intents and purposes whatsoever, and my said nephews and nieces, and their children, and all other parties interested under this my will, shall not impeach or otherwise dispute such decision. And I further direct that the interest of which any person claiming under this my will may be deprived by any such decision, shall not

be revived by any future diminution of their income or otherwise."

Admiral Curzon made four codicils to his will, but they did not, as to this question, affect the will, except by adding about 1000*l.* to the trust fund.

The testator died in 1846, and his will was proved by Alfred Curzon and Robert Holden.

By the death of Nathaniel Lord Curzon, Edward Curzon, a nephew, and Mary Beaumont, and Caroline Esther Drury Lowe, the wife of William Drury Lowe (who were described in the will as Caroline and William Holden, and had since taken the name of Lowe), became each entitled to upwards of 50,000*l.*

It was admitted by Edward Curzon and Mary Beaumont that their interest in the provision made by the testator had determined.

Mr. and Mrs. Holden alleged that, in consequence of the provisions made by their marriage settlement, their interest in the trust fund remained.

This settlement, which was executed on the 13th February, 1827, settled 1500*l.* on the husband for life, remainder to the wife, remainder to the children of the marriage, and contained the following provisions. After reciting that upon the treaty for the said intended marriage it was also agreed that all the real and personal estate and property of every description which the said Caroline Esther, the wife of the said William Drury Holden, might become interested in or entitled to by descent, bequest, or in any other manner in her own right during her then present coverture, and that all the real and personal property of every description which the said Caroline Esther, the wife of the said William Drury Holden, might be then interested in or entitled to in her own right, payable to her at any future time, except a certain sum of 1000*l.*, should be assigned and transferred to the said Alfred Curzon and John Chambers, their heirs, executors, administrators, and

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assigns, respectively, according to the respective natures of such estates and property, upon and for the trusts, ends, intents, and purposes thereinbefore limited and declared respecting the same and thereafter referred to; and that the said William Drury Holden had agreed to covenant in the manner thereafter mentioned for the due and effectual transfer of all such real and personal estate and property: It was further witnessed that in pursuance of the said agreement, and in consideration of the said marriage, the said William Drury Holden, for himself, his heirs, executors, administrators, and assigns, did covenant with the said Alfred Curzon and John Chambers, their heirs, executors, administrators, and assigns, that in case any real or personal property whatsoever should, at any time during the said coverture, descend to the said Caroline Esther his wife, or if she should become entitled to or possessed of the same by bequest or by any means whatsoever in her own right, and in case the said Caroline Esther his wife should be then interested in or entitled unto any real or personal estate, or any property of any kind or description in her own right payable at any future time, except as aforesaid, that the said William Drury Holden, his heirs, executors, administrators, or assigns respectively, and also the said Caroline Esther his wife, would at any time thereafter during the said coverture, upon the request of the said Alfred Curzon and John Chambers, or the survivor of them, or the executors or administrators of such survivor, and at the expense of the said trust estates, execute all such acts, deeds, conveyances, assignments, and assurances in the law, as might be requisite for the effectually assuring all such real and personal estate unto them the said Alfred Curzon and John Chambers, their heirs, executors, administrators, and assigns respectively, according to the nature and quality of such estates respectively, to the intent that the same might be absolutely vested in them upon such and the same trusts, and for such and the

same ends, intents and purposes, and subject to the same declarations and agreements, as are thereinbefore declared and contained concerning the said sum of 1500*l.* and the interest thereof, or as near thereto as the nature of such estates, the deaths of parties, and circumstances, would admit of.

The question was, whether the effect of the covenant was such as to prevent the wife from becoming possessed of a permanent income of 1000*l.*, so as to bring her within the clause of forfeiture contained in the testator's will.

Mr. *Rolt*, Mr. *W. D. Lewis*, and Mr. *Currey*, for those entitled in case of forfeiture.

The words "permanent income" would be satisfied if a nephew or niece became possessed of a fortune of which they might have disposed forthwith.

If such fortune had devolved on a niece who was unmarried, that would, *ex concessis*, be the case contemplated by the testator.

Suppose that a niece were married without a settlement, the fortune would be the property of her husband, yet could it be contended that in that case the forfeiture would not arise? Surely not. Then come to the next step, which was the exact case, that a fortune devolved on a niece who was married, and whose property was secured by a settlement—a condition more favourable for a wife; was not that case within the meaning of the clause? If not, the clause, as regards married nieces, was altogether nugatory, because where there was a settlement the fortune would go to the trustees, and where there was none, to the husband; but this was to defeat the manifest intention of the testator. Where a testator has created an interest and used words intended to defeat it, a reasonable construction ought to be put on his language: *Harrison v. Round* (a).

There were two modes of enjoyment, one, the ordinary

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(a) 2 De G. M. & G. 190—200.

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one, the other, peculiar to a married woman, an enjoyment to her separate use, and the testator doubtless intended in the case of Mrs. Holden, whom he speaks of as a married woman, that use which she could have of a fortune.

But the case was, in fact, reduced to a dilemma. What is it that by the settlement is covenanted to be assigned to the trustees?—whatever fortune Mrs. Holden should become entitled to! Unless she is entitled the clause in the settlement is inoperative, but if she is, the case is clearly the one within the contemplation of the testator.

Again, suppose, instead of money, the property devolving on Mrs. Lowe had been land, that would be clearly within the clause, though the rents and profits would belong to the husband.

Upon the whole it was contended that both technically (because, unless the wife was entitled, the trustees could derive no title) and according to a reasonable construction of the testator's will, the event contemplated by the testator had happened.

Lambarde v. Peach (a) was also cited.

Mr. *Hingeston* appeared for the trustees.

Mr. *Bacon* and Mr. *Hobhouse*, for Mr. and Mrs. Lowe, were not called on.

Judgment.
 —

The VICE-CHANCELLOR:—

The question is, whether it is shown that this lady has become entitled to or is in the receipt of a permanent income, such as would deprive herself and her children of the provision made by the will. At the date of the will the testator knew that she was married, and he therefore fortified the provision made for her benefit by a clause which gave her a life-interest for her sole and separate use independent of her husband. She, and not her

(a) *Coram* V. C. Kindersley, 8th March, 1859.

husband, was the object of the testator's bounty. But before the date of the will, she and her husband had, previous to, and in consideration of marriage, covenanted, that whatever property should accrue to her during the coverture should be settled upon certain trusts, and the first of those trusts was for the benefit of the husband.

It is not disputed that, as to the 50,000*l.* which has very recently accrued to this lady, the settlement which was in existence at the date of the will has an operation. The effect of the settlement is, to prevent Mrs. Lowe, in the present state of the family, during the life of her husband, from receiving any income at all from this property. The utmost that could be said of it (and it is immaterial to the question), is that the husband is now entitled to such an income, and that she as his wife has an indirect benefit from it, as he is the better able to discharge his legal obligation to maintain her. But it was only in respect of property to her separate use, that she was regarded by the testator.

It has been argued that, according to the true construction of this clause, if a nephew or niece had become entitled to an income of the amount specified, and had, immediately afterwards, assigned it and conveyed it away, his or her "having become entitled" would bring the clause into operation, and that, notwithstanding the act of depriving himself or herself of that title, still the clause must have its operation. To that view of the case I accede, but with this qualification, that the act by which the nephew or niece might deprive himself or herself of that right, must be an act done after the right to the property had accrued actually in possession. With reference to the doctrine adverted to by Lord St. Leonards in *Harrison v. Round*, an attempt has been made to maintain the proposition that, whether the act by which the nephew or niece deprived himself or herself of the accruing property be before or after the title has accrued, the effect must be the same. To that proposition I cannot

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accede. Consider the effect of the marital right. This testator knew it, and he guarded against it; and this will must be read keeping in view this—that he intended that it should be only upon the accruer to this lady herself of an equivalent, and more than an equivalent, to her individually as the object of his bounty, that the right which he gave should be lost. It cannot be denied, that if there had been no settlement, and if the husband had, before the right to this property accrued in possession, become bankrupt, in such a case this lady would not be considered as having through the marital right, or in any other way, become entitled to that permanent income which would bring this clause into operation. If that be so, it must follow on the same principle that the antecedent assignment, or covenant, or alienation of the right to this property by the marriage contract before it accrued in possession, must equally prevent the operation of the clause of forfeiture in the will. Whether it be by an antecedent act of bankruptcy, or by an antecedent marriage-settlement, that the enjoyment of the property by the niece individually, and considered as a separate person, is intercepted, the effect must be the same. Consider the case with reference to the effect of the marriage settlement. By this settlement Mrs. Lowe is, during the joint lives of herself and her husband, prevented from receiving the income of this property permanently, or in any other way. The trusts of the settlement gave this property to the husband and not to the wife. But according to the provisions of the settlement an event may occur which, beyond all doubt, would bring this clause of the will into operation, for it must be admitted, that if by the death of the husband, the next trust in the settlement as affecting this property should come into operation, Mrs. Lowe would immediately be in receipt of an income of the amount which would bring this clause into operation. It is necessary to keep in view these two propositions; first, that the settlement does operate to

prevent the present receipt of the income by this lady; and, secondly, that an event may occur which would put her into the present receipt of the income and give to her, who was in her separate character the express object of the testator's bounty, for her own exclusive benefit and her own exclusive enjoyment, such an amount of income as the testator said should deprive her of what up to that time she was entitled to under his will. They seem to me to put in a very strong light, the mode in which the operation of this settlement has affected this property. I can come to no other conclusion than this, that so long as under the trusts of the settlement, not Mrs. Lowe, but her husband is in receipt of this income, she is a niece who is not in receipt of or entitled to a permanent income of the amount which, by the provisions of the testator's will, would occasion a forfeiture. Therefore there must be a declaration to that effect.

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The following declaration was made by the decree:—
Declare, that according to the true construction of the will of the testator, the defendant Mrs. Lowe has not incurred any forfeiture of her interest, and is entitled, for her separate use, to the receipt of the income of one eighth of the accruing share out of the testator's estate. The plaintiffs to pay the costs of the trustees, as between solicitor and client; the other parties to bear their own costs.

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The existence of any circumstance calculated to bias the mind of an arbitrator unknown to either of the parties who have submitted to his decision, is a sufficient ground for the interference of the Court.

Therefore, where a builder by his contract bound himself to abide by the decision and certificates of an architect as to the amounts to be paid for the work, not knowing that the architect had given an assurance to the employer that the cost of the building should not exceed a certain specified amount, although he refused to guarantee that amount, the Court did not consider the decision of the architect made under such a bias as binding, but gave directions so

as to ascertain under the authority of the Court how much remained justly due to the plaintiff. The Court will not readily act on parol evidence to fill up a blank in a written contract, where the object of the evidence is to inflict a penalty or forfeiture.

IN and prior to the year 1853, the parish church at Leiston being in a decayed and ruinous state, the defendant Mrs. Rose, then the Hon. Miss Thelusson, in conjunction with her mother since deceased, sought to obtain subscriptions for rebuilding the edifice, and on the 15th of April, 1853, an agreement was entered into, between Mrs. and Miss Thelusson, and the minister and churchwardens, by which the former agreed as follows:—

That with their own monies and what could be raised by subscriptions, they would raise the sums of money to be applied in rebuilding the church according to the plans of Mr. Buckton Lamb, architect in the said agreement referred to.

The minister and churchwardens, for their part, agreed to perform cartage to the extent of 868 loads, as contained in an agreement signed by certain farmers.

Prior to the agreement, Mr. Lamb had been employed to prepare plans for rebuilding the church at a cost not exceeding 2500*l*.

Mrs. and Miss Thelusson being desirous to employ the parishioners in the works, instead of advertising, a specification of the proposed works was deposited in the parish schoolroom, and certain drawings showing the general elevations were hung up—but there were no detailed working plans exhibited, and no copies were allowed to be made of the plans.

On the 21st of March, 1853, Mr. Lamb wrote to the incumbent, asking that the plans, specifications, and schedules

might be placed in the church or in some other convenient space, that the tradesmen might see them in order to affix their prices to the work. He said that the schedule did not contain the whole of the works; he said they must not be low prices, or they would have no chance; and also that the drawings were not to be copied or removed from the place where they were to be exhibited.

Instead of preparing a specification and working drawing, as is usual, to allow the contractors to take out the quantities, *i.e.*, calculate the amount of work, Mr. Lamb prepared statements or bills of particulars.

The following was Mr. Lamb's particular of the bricklayer's work:—

“ Leiston Church.

“ Bricklayer, &c.

“ An estimate required for taking off and tying up Old Reed, and taking down the old building, cleaning stacking, &c., according to the specification. Yards, 325 cube digging, including filling and levelling and clearing away. 259 concrete. Rods, 12 superficial reduced brickwork, including all labour, materials, and scaffolding. Yards, 450 cube flint rubble walling, all labour and mortar, but exclusive of stones. 66 Kentish rag, in quoins, bond stones, jambs, &c. Nine ditto in arches. Twelve superficial brick flat paving in sand. Feet, 3074 run vat hooping, 1 in. by 1-16th, 12 cwt. 2 qrs. Squares, 10 superficial. Two course of slates to be laid in walls. Feet, 24 run brick flue, 14 by 14. 140 ditto shaft for rain-water pipe, 9 by 9. 300 ditto 4-in. earthenware stocket drain. 200 ditto eaves gutter, per drawing, in 2 feet length, and rabbeted joints. Squares, 140 superior plain tiles, with knobs, 1-10th to be round-end tiles, laid in black mortar. Feet, 274 run valley tiles. 238 ditto ridge. No. 40 air gratings. Assisting stonemason where necessary. Price of bricks delivered at the church. Ditto of Kentish rag. Ditto of plain tiles. Yards, 500 rough stucco.”

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The plaintiffs, who were working bricklayers, calculated the cost of the work by affixing a price to these quantities. The Kentish rag stone they took from the Builder's Price Book, where it is given as costing 20*s.* a cubic yard; accordingly they estimated the cost at that amount, and 40 for arches. The total estimate was 702*l.* 11*s.* 4*d.*, which on Mr. Lamb's representation was reduced to 700*l.*

The above sum having been agreed on, Mr. Lamb tendered for signature the following form of contract:—

"We, the undersigned, do hereby tender for and agree to take down the rubble and other walls of the parish church at Leiston, in Suffolk; to take out the stone windows and door frames; to take up the floor, and to clear up and take care of the same; to take the thatch off the roof, and tie it up in bolts, and to take care of it; to take down the old ceiling; to excavate where necessary, and fill up and level the ground; to do the necessary concreting; to build the rubble and other walls, flues, guttering, tiling, plastering, slate for the walls, iron air-grates, vat hoop iron, brick paving, earthenware pipes, fixing the front, assisting the stonemason where necessary; to supply and work in Kentish rag stone as directed, according to the plans and specification, for the sum of 700*l.*"

The plaintiffs observing that the proposed contract did not specify the quantities as to which they relied on Mr. Lamb's bill of particulars, requested that gentleman to substitute, for the word "specification," the words, "the quantities there given by the architect," which being complied with, they signed the contract in the amended form. They signed the contract on the 21st of April, 1853, and also the specification, to which were annexed the following conditions:—"If any alteration should hereafter be made by order of the said committee or their architect, by varying from the plans or the foregoing specification, either in adding thereto or diminishing therefrom, or otherwise however, such alteration shall not vacate the contract here entered into, but the value thereof shall be ascertained by the said

architect, and added to or deducted from the amount of the contract, as the case may be ; nor shall such alterations, either in addition, or diminution, or otherwise, supersede the conditions for the completion of the whole of the works, but the contractor or contractors shall, if such alterations, of whatever sort, require it, increase the number of his or their workmen, so that the same, as well as the work contained in the foregoing particulars, shall be completely finished and delivered up to said committee on or before the* day of , 185 ; and in failure thereof, the contractor or contractors shall forfeit and pay to the said committee the sum of 5*l.* for every week that the works shall remain unfinished, out of the monies that may be due and owing to the contractor or contractors on account of the said works ; such fines shall be borne in equal proportions by all contractors if the works herein described shall form several contracts. If any doubt or doubts should arise during the execution of the works, or at measuring the extras, (should such occur), or at making out any of the accounts for which the contractor or contractors consider they have a claim over and above the amount of the first contract, the admission and allowance of such claim or claims shall be judged of, determined and adjusted by the said architect without reference to any other person, it being the intention of these conditions that all works of every kind that may be necessary for completing the building, and the well maintaining and supporting the same as well as alterations and additions (should such be made), so that the whole may be made properly sound and firm, are implied in the foregoing specification, although the same may not therein be specifically expressed ; and upon this, as well as in all other matters, the decision of the architect shall be final."

The whole works were divided into four contracts, one of which was taken by the plaintiffs and completed by them

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in August, 1854. They claimed 437*l.* 15*s.* 7*d.*, in excess of the contract, and the extras allowed by Mr. Lamb. Mrs. Rose placed the matter in Mr. Lamb's hands, who declined to allow the claim, and the plaintiffs consequently filed this bill, averring that Mr. Lamb had in effect guaranteed that the cost of the works should not exceed his estimate, and that consequently he had a bias or interest directly adverse to the plaintiffs; that having signed the contract without being aware of this fact, they ought not to be held bound by Mr. Lamb's decision. The bill prayed that, notwithstanding such condition, an account might be taken of what was due to the plaintiffs for works executed; that, in taking such accounts, the proper value of the works executed might be allowed; that no sum ought to be allowed for fine or penalty for delay; and that the defendant might be directed to pay to the plaintiffs what should be found due.

The case made by the bill was, that the quantities greatly exceeded those specified by the bill of particulars prepared by Mr. Lamb, on which the plaintiffs relied; that the price of the Kentish ragstone much exceeded the prices stated by Mr. Lamb, in consequence of his requiring a more expensive description of stone. That the parishioners had failed to perform the stipulated amount of cartage, and that the plaintiffs had to pay 38*l.* for cartage in consequence of such failure. That Mr. Lamb had debited them with 32*l.*, apportioned fine for twenty-six weeks delay in completing the work, which he had no power to do, as no time was fixed by the contract, &c.

The defendants, in their answer, alleged that the plans were in the usual form for work which is to be submitted to public competition, and were quite sufficient to enable any ordinary man of business to ascertain the work to be done, and to take out the quantities; and that the conditions annexed to the specification contained, *inter alia*, the following:—

“The contractor or contractors to find all manner of

materials, tools, scaffolding, ladders, tackle, cartage (except such cartage as before described), and all other things necessary for the completion of the work in every respect, according to the true intent and meaning of the drawings and specifications, and such further drawings to a larger scale as may be required for explaining the works; and the whole of the works to be done in the best and soundest manner, with approved materials and construction, and to the entire satisfaction of the architect. No unsound or inferior materials or workmanship will be allowed on the premises on any pretence whatever; and if any defective, unsound, and inferior work or materials shall have been put into the building in the absence of the architect, the same shall be removed, made good, or otherwise, as the case may be, upon notice being given to the contractors to that effect; and that the work shall be finished in every respect to the satisfaction of the committee or their architect, without reference to any other person whatsoever. No extra work will be allowed, on any pretence whatever, without a written order from the architect."

The answer also denied that Mr. Lamb had ever given any guarantee. He declined to give a guarantee, and merely expressed his opinion that the works would not cost more than 2500*l*. That Mrs. Rose placed no stress on the statement, and did not consider it binding on him.

It appeared from the evidence that Mr. Lamb was applied to to give a guarantee, but declined giving it on the ground that it was not usual; but he gave an assurance to Mrs. Rose that the cost would not exceed the estimate of 2500*l*.

Mr. *Malins* and Mr. *W. D. Evans*, for the plaintiffs.

It was not necessary for the plaintiffs to impute fraud to the architect, but it was clear from the evidence that he had a strong bias against the plaintiffs' claim, arising from a circumstance which was unknown to the plaintiffs

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when they agreed to submit to his decision. It followed, therefore, that they were entitled to relief in this Court.

In *M'Intosh v. The Great Western Railway Company* (a), where there was a similar condition, the Court directed an account.

It was clear that as the dates were left in blank, and no time was fixed for the completion of the works, the penalty ought not to have been inflicted.

Mr. Bacon and Mr. Cotton, for the defendants.

It was not pretended that the architect had been guilty of fraud, which was the only foundation for the case: *Scott v. Corporation of Liverpool* (b). A condition that an agent must be satisfied before the principal is liable is valid, both at law and equity: *Grafton v. The Eastern Counties Railway Company* (c). It was said that the architect had a bias, but in *Ranger v. The Great Western Railway Company* (d) the engineer was a shareholder, and that circumstance, which clearly proved a bias, was held immaterial.

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THE VICE-CHANCELLOR :—

The plaintiffs' case is not put on the ground of fraud. It depends on considerations of another kind. The duties to be performed by Mr. Lamb as regarded the plaintiff were of a judicial character. According to the language of the written contract the plaintiff bound himself in the strongest way to abide by the decision of Mr. Lamb, in an absolute confidence that his decision would be that of a wholly unbiassed man.

A perfectly even and unbiassed mind is essential to the validity of every judicial proceeding.

Therefore, where it turns out that, unknown to one or both of the persons who submit to be bound by the decision

(a) 3 Sm. & G. 146.

(b) *Ante*, 216.

(c) 8 Ex. 699.

(d) 5 H. of L. Cas. 72.

of another, there was some circumstance in the situation of him to whom the decision was intrusted which tended to produce a bias in his mind, the existence of that circumstance will justify the interference of this Court.

Whether in fact the circumstance had any operation in the mind of the arbitrator must, for the most part, be incapable of evidence, and may remain unknown to every human being, perhaps even unknown to himself. It is enough that such a circumstance did exist.

The House of Lords had occasion to consider this doctrine in the case of *Dimes v. The Grand Junction Canal* (a).

In the present case the circumstance tending to influence the mind of Mr. Lamb seems, at first sight, to be but small. He was applied to for a guarantee that the cost of rebuilding the church at Leiston should not exceed the sum of 2500*l*. He, however, declined to bind himself by any guarantee, but he gave an assurance or conveyed to the mind of the defendant Mrs. Rose an assurance on his part that the price should not exceed that amount. The evidence on this part of the case shows that upon the entire faith of this assurance of Mr. Lamb as to the limited amount of the expense, the defendant Mrs. Rose embarked in the undertaking, and agreed to supply the funds for the erection of the church.

Suppose a guarantee had been given by Mr. Lamb, and that he had bound himself by contract that all the expenses beyond the sum of 2500*l*. should be paid by himself, would it be possible to contend successfully that the plaintiff, entering into the contract in ignorance of the interest on the part of the arbitrator, is to be bound by those terms of the contract which left in such a large way all questions as to the amount of remuneration to the decision of Mr. Lamb? Although an assurance is much less strong than a guarantee, and may not, in fact, have biassed the judgment of Mr. Lamb, yet it was

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(a) 3 H. of L. Cas. 759.

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calculated to have that effect. Without imputing corruption to Mr. Lamb, it is enough if there was a circumstance tending to bias his judgment which was unknown to the plaintiff. The power of Mr. Lamb as the architect and engineer, to whose judgment almost everything, both as to quantity and price, was left, was in this contract, as in most others of the same kind, nearly unbounded; and that being so, if there was the smallest speck or circumstance which might unfairly bias his judgment, his decision cannot be absolutely binding upon the contracting party. Therefore the plaintiff is entitled to have the decisions of Mr. Lamb reviewed by this Court.

The complaints of the plaintiffs are various. One complaint is, that they have been charged with a sum of 32*l.* as a fine for delay in not completing the building of the church by a certain day. The written contract signed by the plaintiffs was, as to the time of completion, in blank. The case of the defendants is, that although the written contract was in blank, each of the contracting parties was told verbally the day fixed for the completion of the building. That is by no means enough. Even if the evidence were clear (which it is not), in order to introduce this term into a written contract by parol evidence there must be something very strong in any case. But in this case the introduction is sought in order to inflict a penalty. In all that relates to penalties, the Court exercises a very nice and scrupulous judgment. The evidence, as to the substitution of the verbal contract for the blank contained in the written contract, is far from clear. On that part of the case I think the decision of Mr. Lamb is wrong. It is a harsh and severe judgment, and cannot be upheld.

The next point in dispute is one as to which I think the case of the plaintiffs fails. An expensive and important part of these works consisted in the quoins and work for the windows of the church, and in the supply of Kentish rag stone, which was a material with the price of which

the plaintiffs were not very conversant. It seems they thought 20*s.* a fair price, but Mr. Lamb said 16*s.* would be enough, and would leave them a profit. The plaintiffs, however, did not rely on the opinion of Mr. Lamb, but they consulted persons whom they conceived to be of adequate skill, and made the contract relying upon the information of those persons. That being so, it cannot be said that any representation on the part of Mr. Lamb was so entirely the ground of the contract in this respect as that the plaintiffs should be entitled to relief.

Another subject of complaint is as to a matter in which I think the plaintiffs have met with conduct illiberal and unjust. It was promised and agreed that, as to the cartage of the materials, the plaintiffs should have the assistance of the parishioners. As might be expected, the parishioners, farmers and others, who had occasion for their own horses and waggons, were not always able to supply that which had been promised to the plaintiffs as an inducement to the contract, and the plaintiffs were put to very considerable expense in respect of cartage. A claim for cartage was made by them to the amount of 38*l.* 12*s.*, which is a considerable sum to working men such as these plaintiffs, and it was refused on the pretext that vouchers were not produced. If it was certain, as it must have been beyond a doubt, that the plaintiffs were obliged to pay for the cartage, if the vouchers were not forthcoming, why was the other evidence of payment rejected? Why was nothing done but a stern refusal to comply with this demand, and that too in the face of the statement made by the Rector of the parish, under whose view these works proceeded, and of statements by other persons, who knew, as the defendants had an opportunity of knowing, very well, that the plaintiffs had incurred this expense, and were therefore entitled to be remunerated in respect of it?

The next part of the case involves a question of some

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difficulty. The contract, as signed by the plaintiffs, has in it an alteration introduced at their instance. There is conflicting evidence as to what is usual on the part of architects in contracts of this kind; but upon the weight of evidence it seems that the course pursued by Mr. Lamb as to the document called the Bill of particulars, which is a statement of the quantities of work to be done, and upon the footing of which the contract was made, was not a safe course for the architect, and I think it was not, upon the evidence, the usual course. Architects of established reputation have stated upon oath their opinions, that an architect who delivers to the contractor specifications of the exact quantities of work to be done as part of the contract—as that which is to guide the judgment of the contractor in making his tender for the work—does what is not a usual course, and is not a safe course. Upon the fair construction of this contract, this bill of particulars seems to be of the Essence of it. It brings the case to this: the contractor was asked to say for what price he would execute so many cubic yards of digging and of concrete work for the foundation. If the contractor's offer is accepted, it must be construed as a contract to do so many yards, and no more. That course is obviously unsafe, and consequently not usual, because it can hardly ever be accurately known beforehand what is the exact number of yards that may be necessary, and in that case, if it exceeded the specified number of yards, the excess would be extra work. It is said by the defendants, first, that this contract is made in a usual way; and secondly, that the contractor must know as well as the architect that it was only a guess in the statement as to the amount, and that when the work came to be done it might be that a greater number of yards might be necessary; and therefore the contractor ought to consider that contingency in making his tender. But the simple question is, whether the amount of work to be done beyond that which

is stated in the Bill of particulars in order that a tender might be made on the footing of it, is to be extra work or not. I cannot adopt the view that the quantities of work referred to in the written contract are the quantities appearing on the drawings, because the quantities appearing on the drawings were obviously altogether inapplicable to this question. The utmost that can be said of the drawings is, that the dimensions upon them would enable a calculation to be made, which calculation, however, did not appear on the drawings. The words of the contract are, that the work is to be "according to the plans, and the quantities there given by the architect," and when I look at the evidence, and find that along with the plans there was exhibited to the contractors this paper or Bill of particulars which states the quantities, this statement of quantities is as much a part of the contract as the drawings themselves. Therefore, my opinion is that the plaintiffs are entitled to be paid in addition to the 700*l.* for all quantities done beyond those mentioned in the bill of particulars.

The decree must be as follows :—

Declare that the plaintiffs are entitled to be paid for all quantities of work done by them beyond the quantities mentioned in the exhibit (I), and in addition to the sum of 700*l.*, but are not entitled to any allowance in respect of the price paid by them for Kentish rag stone; and it is ordered that the following inquiry be made, that is to say, an inquiry what is due to the plaintiffs in respect of such work or quantities of work done. And this Court doth declare that the plaintiffs are entitled to be paid the sum of 38*l.* 12*s.* in respect of the expenses of cartage, and are not to be charged with the sum of 32*l.* or any other sum in respect of the penalty for delay in completing the contract; and it is ordered that the following further inquiry be made, that is to say, how much remains due from the defendants to the plaintiffs in respect of the work done under the contract in the pleadings mentioned, having

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regard to the aforesaid declaration. And it is decreed that the defendants do pay to the plaintiffs their costs of this suit up to and including the decree, such costs to be taxed by the proper taxing-master, in case the parties differ about the same; adjourn further consideration, &c.; liberty to apply, &c.

Reg. Book, June 5th, 1858. A. 57, 1125, fol. 13.

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Decree to set aside a mortgage taken by a solicitor from his client to secure a sum consisting partly of a gross sum agreed to be paid for professional services, and as to the rest of the balance recited to be due on a settlement of accounts, where the evidence showed that the client, from his situation as to ill health, was unable to take an active part in managing his own affairs, and where

IN this case a creditor's suit had been instituted to administer the estate of Thomas Hughes of Glasbury, in which a decree was made directing the usual accounts. In prosecuting such decree it became necessary to obtain an account from William Higgins, who, as appeared by the chief clerk's certificate, refused to account. On further consideration liberty was given to the parties seeking the account to take such proceedings as they might be advised; and accordingly this bill was filed by the executors and trustees of the testator Thomas Hughes against William Higgins and Mary Ann Beddoes, his mortgagee, of whom the former had been solicitor to Mr. Hughes from April, 1848, down to his death.

The bill prayed—

That it might be declared that an indenture of mortgage dated the 22d December, 1849, should stand as a security only for such amount, if any, as the defendants could prove to be justly due to them.

there was no evidence of any proper statement or examination of the accounts. The mortgage was declared to stand as a security only for what should be found justly due on a taxation of the bills of costs and on an account of all dealings and transactions.

Secondly, that the defendant Higgins might be ordered to make out and deliver proper bills of costs in respect of the matters aforesaid.

Thirdly, that an account might be taken of the receipts of the defendant William Higgins, and particularly of what had been received by him or by any person or persons by his order for his use, or in respect of the rents, profits, and proceeds of the said estates or otherwise out of the property, or on account of the said testator, and of his application thereof, and of what he might have received but for his wilful default; and in taking such account that he might have credit only for such charges and payments as he could show he ought justly to have credit for; and that it might be declared that the said Mary Ann Beddoes could stand in no better position as to the matters aforesaid than the defendant William Higgins; and that both the defendants might be decreed to convey the property remaining unsold to the plaintiffs, or as they should direct on receiving payment of such amount, if any, as under the account taken was justly due to them as mortgagees. The plaintiffs being ready and willing to come to a just account and to do all that in equity ought to be done on their part.

The bill alleged that the testator Thomas Hughes was early in life afflicted with a grievous and unsightly cancerous disease, of which he eventually died. That he lived for the greater part of his life in great seclusion, suffering no visitors to enter his presence, or even his own domestic servants to see him.

That in the year 1846, proceedings in lunacy were instituted by a relative against Thomas Hughes, which were successfully resisted by the defendant Higgins as his solicitor, and that after these proceedings the defendant was his sole adviser in legal and pecuniary matters, and obtained complete ascendancy over him.

The deed which it was sought to have declared to be a

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mere security for what was justly due to the defendant, was between the testator of the one part and the defendant William Higgins of the other. It recited that the testator was indebted to Messrs. Wilkins & Co., bankers, in the sum of 850*l.* on a bill of exchange, on which the defendant Higgins was also liable. That the testator was indebted to a Mrs. Papendick in two sums of 3000*l.* and 5244*l.* 15*s.* 3*d.*, claimed on mortgage, and for which process had been taken out against him. That he was also sued by Morgan & Hemp, bankers, Hereford, for 200*l.* 8*s.* 6*d.* and interest. That he also owed the defendant Higgins for professional services in legal and equitable proceedings, and in business of great intricacy, bulk, and importance, the amount of which was computed at 2500*l.* as was by the said deed agreed to; and that the testator was indebted to various other persons in the amount of 450*l.* The deed further recited that Thomas Hughes was to sell Glyn Farm in the parish of Llangollen, for 3000*l.*, the purchase-money to which Mrs. Papendick claimed, but it was believed she was only legally and equitably entitled to 2223*l.* 9*s.*, with interest from November then last past. That Thomas Hughes had agreed to sell the Tillepengam estate for 1000*l.*, as to which Mrs. Papendick set up a claim on which she was not entitled. That he had sold the Ponslington estate for 3700*l.*, also claimed by Mrs. Papendick without reason. That the produce of these estates amounted to 7810*l.*, and if applied in satisfying Mrs. Papendick for debt, interest, and costs, would leave a balance of 1000*l.* unsatisfied, which, with the previous sums of 850*l.*, 200*l.*, 2500*l.*, and 450*l.*, made the sum of 5000*l.*, which appeared to be, as nearly as was ascertained, the debts of Thomas Hughes which would remain unsatisfied after payment of the several debts amounting to the purchase-money of 7810*l.* before referred to. The deed further recited that the said Thomas Hughes had agreed to transfer the said

sum of 7810*l.* to the said William Higgins upon the special trusts set forth, for the benefit of Mrs. Papendick in an indenture of even date, and had applied to the said William Higgins to pay the several further necessary demands aforesaid, and the balance of debt and costs that might be due to Mrs. Papendick, and the several debts of 850*l.*, 200*l.*, 450*l.*, and to let 2500*l.* continue as a debt bearing interest and making together 5000*l.* The said indenture then witnessed that in consideration of the said several sums of 850*l.* and 200*l.*, and the computed balance of 1000*l.* and 450*l.* so agreed to be paid or satisfied by the said William Higgins as aforesaid, making with the £2500*l.* together 5000*l.*, the monies, lands, and hereditaments therein described were conveyed to the said William Higgins, and his heirs, subject to a proviso for redemption or repayment by the said Thomas Hughes, his executors or administrators, to the said William Higgins, his heirs and assigns, of the said 5000*l.* and interest at 5*l.* per cent.

By an indenture dated the 23d of May, 1854, after reciting that the sum of 2500*l.* remained due and owing to the defendant William Higgins on the said security, the said sum of 2500*l.*, being so much as was then owing out of the same sum of 5000*l.* to the said William Higgins was assigned to Mary Ann Beddoes, together with the said securities, to secure the repayment of the said sum of 1000*l.* with interest.

Thomas Hughes died on the 25th of June, 1855, having, by his will, dated the day after the deed, directed payment of all his just debts, and charged his real estate with payment thereof. He devised and bequeathed to the plaintiffs, their heirs, executors, administrators, and assigns, all his real and personal estate, on trust for sale and payment thereof of the costs, charges, and expenses of his said trustees; and next to pay all his just debts and the interest of such debts as carried interest, including a debt secured

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on mortgage to Mrs. Papendick. He directed his real estates to pay so much of the costs, charges, and expenses as his personal estate should be insufficient to pay and discharge, and the residue to be considered as his undisposed of personal estate.

The defendant Higgins, by his answer, deposed that he had been employed by night and by day for many months in conducting the defence of Mr. Hughes against the commission of lunacy; that he had to perform the whole labour himself, as Mr. Hughes would allow no one else to approach him; that he had personally prepared upwards of eighty affidavits, and had no time during this period to keep detailed accounts; that he became seriously ill from his exertions, so that his life was despaired of. That Mr. Hughes felt most grateful to him, and expressed his intention of rewarding him handsomely. The defendant alleged that he agreed to refer it to an arbitrator, to determine what amount was to be paid him by way of remuneration; but he submitted, that under the circumstances he was not bound to make out and deliver bills of costs. The answer further averred, that at the date of the indenture the testator was indebted to him in a large sum for costs, in defending several actions which had been commenced against him by various persons; also for the costs for the preparation of several deeds to bar an estate tail, and in making preparation for the sale of the estates. The answer averred that the defendant had not the means of making out four bills of costs relating to the matters aforesaid. That Mr. Hughes of his own free will, and without any suggestion on his part, waived the delivery of the bills of costs, which the answer submitted he had a right to do, and that the testator and the defendant having computed and calculated the full particulars of the matters of account between them, and ascertained so far as could be done without the delivery of bills of costs, the fair remuneration for professional costs and charges, and finally

agreed to take the sum of 2500*l.* as the balance due to the defendant. The answer also set forth a receipt for rents of real estate received, and for the estates sold by the defendant, and the receipt and payment by the defendant from and to the testator's creditors.

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Mr. *Malins*, Mr. *Giffard*, and Mr. *Walford*, for the plaintiff.

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Upon the evidence, the conduct of the defendant would afford ground to open the account, even apart from his professional relation to the testator, *à fortiori* the account could not stand as between a solicitor and his client.

The law was well settled. In *Coleman v. Mellersh* (a), where the accounting party was the solicitor of the party sought to be charged, no bill of costs had been delivered; and it appearing that there was an overcharge of 75*l.*, it was held that the account must be dealt with as an open account. In *Lawless v. Mansfield* (b), the law of the Court was stated to be, that a general charge (of unfair dealing) was sufficient as between solicitor and client, to require the solicitor to vouch his accounts, although he had securities by receipts and instruments, independently of the covenants (c).

The case of *Morgan v. Evans* (d), and *Hesse v. Briant* (e), were also cited.

Mr. *Greene*, and Mr. *H. C. Ward*, for the defendant Higgins.

The facts in evidence show that the defendant has not been guilty of misrepresentation or suppression, or of unduly exercising his power (if power he had) over the client. The deed was executed deliberately, with as much advice

(a) 2 M. & G. 309.
(b) 1 Dr. & W. 557.
(c) *Ibid.* 611.

(d) 3 Cl. & F. 159; 8 Bligh,
N. S. 777.
(e) 6 De G. M. & G. 623.

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and assistance as was necessary according to the rules affecting the relation of solicitor and client; and if so, the account could not be disturbed: *Moss v. Bainbrigge* (a).

It was contended, that because a gross sum was charged that necessarily made the transaction improper; but in *Stedman v. Collett* (b), it was held that a settlement of a solicitor's bill by a fixed sum was valid when fairly entered into, and an agreement of that kind was held valid.

Mr. *Craig*, and Mr. *Eddis*, for Miss *Beddoes*.

It is not enough to establish that a security given for costs to a solicitor by his client took place without the intervention of a solicitor. In order to open the transaction, there must be distinct evidence of pressure or improper conduct, as well as distinct averment of a specific error. The proposition that a general charge is sufficient to open the accounts between solicitor and client is not the law of this Court: *Blagrove v. Routh* (c).

In *Waters v. Taylor* (d), the Court refused, without proof of error amounting to fraud, to order the taxation of a solicitor's bill of costs which had been secured by a deed. In *Cooke v. Setree* (e), without evidence of gross error, fraud, or undue pressure, the Court refused to restrain the solicitor from enforcing the security. The same principle was acted on in *Re Whitcombe* (f), though in that case the Court refused to give the solicitor the costs, as he had acted without sufficient prudence.

Mr. *Giffard* in reply.—It is established that the confidential relation subsisted when the deed was executed; that by the deed the defendant claimed, besides a gross sum for professional services, a balance due for monies alleged to have been advanced.

(a) 6 De G. M. & G. 292—309.

(b) 17 Beav. 608.

(c) 2 K. & J. 509.

(d) 2 M. & C. 528.

(e) 1 Ves. & B. 128.

(f) 8 Beav. 140

But the schedule in the answer showed that there had been received by the solicitor on behalf of his client 1200*l.*, and there was nothing to show that when the client agreed to give that mortgage for the sum he was ever told that the defendant had received one farthing. It was submitted, therefore, the account could not stand.

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This is one of a class of cases of great importance. The law with respect to them is, I think, well established. By the law of the Court, a solicitor may settle his accounts with his client, by an agreement to take a gross sum as a remuneration for his services, without a statement of items, or the delivery of full and particular bills of costs. But if he does settle an account with his client, or if he does make an arrangement with his client to accept a gross sum, instead of delivering bills of costs, it behoves the solicitor to use great caution, and to preserve sufficient evidence that it was a fair transaction, and that his client was not under the influence of the pressure arising from the relation of solicitor and client, but was acting either by good advice; or on the dictates of his own judgment, with every opportunity of exercising it properly, from his own good sense and intelligence, with a sufficient capacity and knowledge of business.

The Vice-Chancellor Wood, from his observations in the case of *Blagrove v. Routh* (a), seems to have thought that Lord St. Leonards, in the case of *Lawless v. Mansfield* (b), laid down the doctrine that, if there be an account settled between solicitor and client, the bare existence of the relation of solicitor and client is enough to induce the Court to open the account, without the proof of any erroneous items, or the proof of anything more than the existence of the relation of solicitor and client.

(a) 2 K. & J. 509.

(b) 1 Dr. & War. 557.

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That is a misapprehension of the language of Lord St. Leonards, who says the account will be opened, "if sufficient cause be shown." These important words, "if sufficient cause be shown," seem to have escaped the notice of the Vice-Chancellor Wood.

In the case of *Welles v. Middleton* (a), Lord Thurlow lays down the rule in these terms. "In the case of attorneys, it is perfectly well known, that an attorney cannot take a gift while the client is in his hands, nor instead of his bill. There would be no bounds to the crushing influences of the power of an attorney who has the affairs of a man in his hand if it was not so. But once extricate him and it may be otherwise."

The difficulty in these cases is always upon the circumstances under which the transaction takes place, and whether they are such as to relieve the client from the pressure. The intervention of a third party as a competent adviser is only one way in which the pressure may be removed. In the case recently before the Master of the Rolls, of *Stedman v. Collett*, where a gross sum was paid by the client, it was held to be a valid transaction, because there was evidence of circumstances which showed the fairness of it, although there was not the intervention of a third party. It was the case of a client who came to make his bargain with the solicitor, after the relation had ceased. Lord Eldon, in the case of *Cooke v. Setree*, said (what every judge who has to deal with cases of this kind ought to feel) that a just and temperate consideration should be applied by the Court to the circumstances of each case.

I do not think there ever came before the Court any case in which the pressure presumed from the relation of solicitor and client is likely to have been stronger than in the present. The unfortunate client was a man afflicted with a disease of a frightful and painful kind—a disease which removed him almost from the means of

(a) 1 Cox, 125.

calling, of his own accord, for the assistance of other persons to advise him in his affairs. It appears that there were only three persons whom this unfortunate gentleman was in the habit of allowing to approach him, besides the defendant himself, as to the management of his affairs. What was done by this solicitor, when he was arranging to accept a gross sum as a remuneration for his professional services, in order to extricate his client from that pressure which the Court, from motives of policy, attributes to the relation? He was about to bind his client by a contract for the payment of a large sum, and to take from his client a mortgage of the whole of his client's property to secure this large sum to be fixed by agreement. In all these cases the doctrine is that the subsistence of the confidential relation constitutes an imperfection in the consent given by the party who is to be bound by the contract. The imperfection in this case might have been cured in various ways. The most obvious mode would have been to call in the assistance, at least of some one, if not all, of the three persons whom the client was in the habit of consulting. At any rate the defendant was bound to see that his client had the advice or assistance of some capable person. Nothing of the kind was done.

The transaction, as recited in the deed, is a transaction that involved some computation or calculation made at the time. What were the powers of this afflicted gentleman to make that computation which is recited in the deed? It is obvious that, unless there was some other assistance than the assistance of the man who was to take the benefit, the transaction has an incurable infirmity. But the case is more than that; for the transaction, as recited in the deed, is not exactly the same as it is described by the defendant in his answer. The defendant Higgins is bound by the recitals of the deed. He claims under the deed. He says it is a valid deed. The transaction recited in the deed is not only an agreement to pay a gross sum in lieu

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of a bill of costs, but it complicates with the amount agreed to be paid for professional services a balance due for moneys advanced and paid on account of the client; and the defendant states in his answer, what is more imperfectly stated in the deed, that some process of calculation took place at the time when the settlement of accounts was made and this gross sum agreed upon. No document is produced in evidence—not a scrap of paper is produced—to show that there was laid before this unfortunate gentleman any statement in figures to give him the least notion of the amount of that balance, or any means of calculating it. But what is worse, the schedule to the answer discloses the fact that, in respect of the business done and monies advanced, there had been received by the solicitor on behalf of his client sums amounting to 1200*l*. It was said with great force that there is nothing at all to show that the client, when he agreed to give the mortgage for this sum of 1200*l*., consisting partly of the balance due in respect of monies advanced, was ever told by Mr. Higgins that he had received one sixpence of that 1200*l*., or that he knew anything about it.

There is no evidence or even statement in the defendant's answer that Mr. Hughes ever investigated the account, or that the defendant ever asked him to examine it, or even to look at it. There is no evidence of a single sixpence due upon the cash account. What Mr. Higgins has to show is, that there was a balance due upon the cash account. He shows that there is a cash account, but he has not shown that there was a single sixpence due upon the balance of that account. The law of the Court puts it upon him to prove the truth of the recitals in this deed, and he has entirely failed in that proof. The infirmity in this single respect would be enough to make it the duty of the Court to say that this deed of mortgage can only stand as a security for what shall be found to be justly due. That is all that the plaintiff asks. The case is that of a

security taken for the balance of an account—the balance consisting partly of a remuneration for professional services, and partly for a balance due upon a cash account. No balance upon a cash account is proved, and the two things being mixed up, and one gross sum taken for both, this Court, upon the principle of *Coleman v. Mellersh*, would be bound to direct that the deed shall stand as a security only for so much, if anything, as shall be found due for costs and on the balance of the cash account.

There is, however, one part of the case as to which I did feel at one time considerable difficulty. It seemed to me that, if the law of the Court allowed a client to arrange with his solicitor to accept a gross sum instead of making out a detailed bill of costs, a deed of this kind, although in no degree binding as to the amount, yet might be enough to be binding upon both parties, to the extent of having the account settled upon the footing of a gross sum being allowed. I had a difficulty in my mind as to whether the form of the decree, consistently with what might be thought due to the situation of both defendants, ought not to be, instead of having the bills of costs decreed to be delivered and sent to the taxing-master, to have them sent to my chief clerk, to inquire whether, upon the whole, this was a proper sum to be allowed. But, upon an attentive consideration of the case, I think that is a view wholly unsustainable. In the first place, it is unnecessary, in order to do justice, looking at what the practice in the office of the taxing-master is. During the argument I thought it my duty to send for one of the taxing masters, to ascertain from him what was the practice as to taxation in cases where the usual order is made against a solicitor, to deliver his bill of costs to be taxed, in case it appeared that the solicitor—from some accident or from some circumstance that may be accounted for in a satisfactory way—is deprived of the means of delivering full bills of costs, as from having lost his books and papers,

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or from having acceded to a desire of his client that he should not keep any detailed accounts, but that he should be remunerated on the footing of a gross sum. I find it to be a matter of familiar occurrence in the office of the taxing master to consider what is proper to be done with reference to any items of that kind. Mr. Follett, the taxing master, the benefit of whose information I have just now had, has told me that in a case now before him the very circumstance has occurred. In such a case the taxing master requires the best evidence that can be given: affidavits or other evidence of the nature of the work done, and all other circumstances to show what sum would be proper to be allowed. Therefore that alone would be enough to induce me to come to the conclusion that, following the decree of Lord St. Leonards in *Lawless v. Mansfield*, that would be the proper course for the Court to take in the present instance, and would give to Mr. Higgins ample means of doing justice to himself, so far as he can do it, from the peculiar circumstances of the case. But beyond that, looking at the recitals of the deed, where such a complication occurs in making up the gross sum, the decree must direct bills of costs to be delivered, and to be sent to the taxing master in the usual way.

Upon the whole case, therefore, giving full and fair weight to all the statements in the answer of Mr. Higgins, it seems to me that he has entirely failed to show in this transaction that his client Mr. Hughes was relieved from that inequality which the Court calls pressure arising from the relation of solicitor and client.

It only remains to consider the case of the mortgagee, and I think that her deed can only stand as a security for what shall be found to be justly due to Mr. Higgins. In *Coleman v. Mellersh*, Lord Cottenham decreed the defendant to pay the costs of the suit up to the hearing. That was a very strong case. I am not aware of any other case in which the Court has gone so far as in the case

of *Coleman v. Mellersh*; and yet there, where the circumstances were so strong in favour of the solicitor, although the Court found itself bound to make the decree, it might have said the solicitor should not pay the costs; but it made the solicitor pay the costs to the hearing. This was done, I suppose, upon the principle that the party who fails in the contest should pay the costs of the litigation. The more I consider the matter, the more just does that decision seem to be, where the case is one between solicitor and client; for the solicitor is bound to know the law, and is bound to advise his client, and protect his client's interest, and is also to be considered as knowing how to protect his own. And the whole of this litigation has arisen from this solicitor not taking those proper steps to protect himself against that inequality in the imperfection of the consent of his client to an arrangement of this kind—an imperfection which he knows to exist, and which the law tells him may be cured by using proper means to relieve the client from the pressure of the relation. As to Mrs. Beddoes, the mortgagee, I can see nothing to relieve her from the obligation of bearing the costs.

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Mr. *Greene* asked his Honour, considering that Mr. Higgins had been partly prevented from making out his bills of costs, and considering also that owing to the lapse of time many of his vouchers were lost, to order, under the 54th section of the Chancery Procedure Amendment Act, that the entries of the defendant might be taken as *prima facie* evidence, when they were contemporaneous with the transactions, until displaced by the plaintiffs.

The VICE-CHANCELLOR.—I think not, for the reason expressed by Lord Cottenham in *Coleman v. Mellersh* (a). The justice of the case requires that this should not be taken as a settled account, and no special directions ought to be given.

(a) 2 Mac. & Gor. 314.

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After some discussion on the question of interest, in the course of which the cases of *Lawless v. Mansfield*, and *Moss v. Bainbrigge*, above cited, were referred to—

The VICE-CHANCELLOR, with reference to the last case, said that interest upon bills of costs could not be allowed. But where the transaction was held by the Court to amount to this—that the deed was to be a valid security for whatever should be found due, he thought the right to the interest should follow as a matter of course.

Declare that the deed of 22d of December, 1849, shall stand as a security for such sum as upon the taking of the account shall appear to have been fairly and justly due to the defendant at the time of the execution of the mortgage (following the decree in *Lawless v. Mansfield*); that the defendant Higgins be ordered to deliver proper bills of costs; an account to be taken of receipts and payments; reserving further consideration.

Nov. 25th.

Re SIR THOMAS JONES'S SETTLED ESTATES.

Before the certificate is signed approving of a purchaser at a sale under the direction of the Court, the biddings will be opened in favour of a bidder who makes a substantial advance in the price; but after the eight days have expired and the certificate is signed, the Court will not disturb the first purchase, unless in an extraordinary case.

THIS was a motion on behalf of Mr. G. W. Edwards, that he might be at liberty to open the biddings under the sale directed by this Court as to lot two, upon an advance of 200*l.* which he offered, &c., &c.

By a decree of the Court, parts of the estates settled by the will of Sir J. W. T. Jones, deceased, were advertised by the chief clerk for sale by auction in two lots, at the Raven Hotel, Shrewsbury, on the 24th of August, 1859.

Mr. Edwards and Mr. Farnstone bid against one another up to 2580*l.*, when Farnstone bid 2600*l.* and was declared the purchaser.

Edwards by his affidavit deposed that there was an agreement between himself and Farnstone that they would bid from 45*l.* an acre for the lot, that Farnstone was to be the last bidder, and, if declared the purchaser, was to convey the piece of land called Wyrly-y-toe to Edwards, and the price as between Edwards and Farnstone was to be settled by John Ward.

Farnstone by his affidavit denied that any such arrangement took place, and deposed that Edwards had said, "It's no use our bidding against each other like two fools;" that ultimately he (Farnstone) requested Edwards to make some final proposal before he entered the room, stating that if he did not there would be an end of it."

The notice of motion was given within the eight days allowed for an appeal against the certificate.

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Mr. *Karslake*, for the motion, contended that it was sufficient on the authority of the modern decisions to show that the application was within the eight days, and that there was a more advantageous offer for the property. In *Ware v. Watson* (a), where the Lords Justices differed from his Honour as to the sufficiency of the special circumstances, it was admitted throughout that the rule now was, that if the application was made in time, and the offer sufficient, it was a matter of course to open the biddings. The old cases no doubt were at variance with the present practice, which was first clearly established in *Tyndale v. Warre* (b), and *Thornhill v. Thornhill* (c). Lord Lyndhurst, in *Lefroy v. Lefroy* (d), distinctly laid it down that, where the application was in time, the only

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(a) 7 De G. M. & G. 739.

(b) Jac. 525.

(c) 2 J. & W. 347.

(d) 2 Russ. 606

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thing the Court had to consider was, whether it was worth while to open the biddings. In the recent case of *Osborne v. Foreman*, reported on appeal in the House of Lords under the name of *Barlow v. Osborne* (b), the principle was clearly settled.

Mr. *Freeling*, for Farnstone, admitted that the rule had been changed, but still it was always a matter for the Court to consider that the person seeking to open the biddings was present at the sale. Here he bid several times, and might have continued bidding if he pleased, and only assigned this agreement, which was positively denied, as his reason for not doing so. Here also the case made was an improper agreement, which certainly did not entitle him to indulgence; it was submitted that in such a case the Court would not go the length of opening the biddings. It was a course which some of the judges thought injudicious, as likely to interfere injuriously with sales under the Court. [The VICE-CHANCELLOR.—In what case?] In the case of *Barlow v. Osborne*, Lord Cranworth expressed his disapproval of the practice.

Mr. *Karslake*, in reply.—Edwards and Farnstone were almost the only bidders; it was necessary, therefore, for Edwards to bid in order to reach the reserved price, and his doing so is not inconsistent with the alleged agreement. As to the agreement, that is no objection to the application, as the Court only looks to the interest of the vendors. *Carew's Estate Act* (c).

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In this case the gentleman who has purchased at a sale by auction, or rather who was the highest bidder, has not

(a) 6 H. of Lds. Ca. 556. (b) *Ibid.* (c) 26 Beav. 187.

yet been certified by the chief clerk to be the purchaser. But, before the issuing of the certificate that he is in fact the purchaser, another person has offered to give more for the property, and now asks to have the biddings opened.

Looking at what the Lords Justices have decided in *Ware v. Watson*, the law appears to be, that so soon as the certificate, which is not made until after eight days have expired, has declared that the highest bidder at the sale is the purchaser, there must be shown a very strong case, supported by special circumstances, to induce the Court to open the biddings. But, on the other hand, if the application be made before the eight days have elapsed, and before the right of the highest bidder has been confirmed by the certificate, it is usual on a proper advance to open the biddings.

What the Court always looks at in sales made under its authority is to do the most complete justice to those whose property it has ordered to be sold, and to obtain for such property the highest price that any one will give for it. It follows, therefore, that, unless where to act otherwise would operate unjustly on other parties, the Court will always sell the property to the highest bidder.

In this case, before the title of the highest bidder at the sale has been confirmed, another person has offered 200*l.* in advance of that offered at the sale, being nearly ten per cent. beyond what was offered at the auction. Under such circumstances no injustice will be done by opening the biddings, because a long course of practice has established the rule of opening the biddings in such a case; but on the terms that the person against whom the biddings are opened must be indemnified in respect of all the costs and expenses he has incurred.

It has been said that this practice of opening the biddings at all, is calculated to damp biddings at sales under the direction of the Court, and prevent reasonable men from attending such sales. But if I thought so, I should

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hesitate in making such an order. But there does not appear to be any solid ground for such a notion, and I shall therefore make the common order to open the biddings, Mr. Edwards indemnifying the highest bidder for his costs.

July 16.

MARE v. SANDFORD.

It is a fraud on the bankrupt laws for any creditor secretly to bargain for or obtain a larger dividend than the other creditors; and this principle applies to a secret bargain after the bankruptcy and before any composition under the arrangement clauses was agreed to. On a bill by a bankrupt, the Court decreed delivery up and cancellation of a bill of exchange to secure a larger dividend than was received by the other creditors under the arrangement clauses, although this private agreement was made before the composition under the arrangement clauses was made.

THIS bill was filed by Charles John Mare, a bankrupt, praying—

First, that it might be declared that the consideration for a certain bill of exchange for 394*l.* 14*s.* 8*d.* accepted by the plaintiff was illegal, and that such bill was void in the hands of the defendant.

Secondly, that the defendants might be ordered to enter up satisfaction of the judgment for 408*l.* 11*s.*, which was signed by them on the 8th of September, 1857.

Thirdly, that the defendants might be restrained by injunction from taking the plaintiff in execution under the said judgment, or from taking any other proceedings against the defendant's person or property under the said judgment.

The bill stated that for some time prior to the 21st of September, 1855, the plaintiff carried on the business of a ship builder at Blackwall, under the style of C. J. Mare and Company, and was a trader within the meaning of the Bankrupt Consolidation Act (1849).

On the 21st of September, 1855, the plaintiff being unable to meet his engagements with his creditors, pre-

sented a petition to the Court of Bankruptcy for an arrangement under the Act, and thereupon the first private sitting of the Court was fixed for the 25th of September, 1855.

On the 28th of September, 1855, the plaintiff filed his accounts and set forth his proposal.

The private sitting was held, but the proposal was not accepted, and the plaintiff was duly adjudged a bankrupt.

The creditors proved their debts to a considerable amount, and the defendants, who carried on business as iron founders at York, under the style of Sandford & Heptinstall, proved their debt for 1556*l.* 7*s.*

In the month of April, 1856, the plaintiff proposed to the defendants to pay 5*s.* in the pound and 5*s.* by a bill of exchange, on condition that they would assign their debt to a Mr. Quilter. On the 25th of April the plaintiff sent the defendants the following letter :—

“ 56, Lombard Street, 25th April, 1856.

“ Dear Sirs,—With reference to the communication made to you on my behalf by Mr. Morris, I beg to say that the acceptance proposed to be given to you for the second 5*s.* will be drawn by my brother Samuel Mare and accepted by me. I beg further to add that my object in seeking to effect this arrangement is, that I may have the opportunity of ultimately paying you 20*s.* in the pound. I may add that nearly all the creditors have accepted 5*s.*, but considering this is a first transaction, I deem it just that I should make you an exception, which I have done in some similar cases. As time now presses, I shall esteem it a favour if you will give this matter your early attention.

“ Believe me, dear Sirs,

“ Faithfully yours,

“ CHARLES JOHN MARE.

“ Messrs. Sandford, Brothers.”

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The defendants accepted this proposal, and received the sum of 5*s.* in the pound in cash, and the bill of exchange for 389*L.* 1*s.* 9*d.*

On the 1st of May, 1856, the defendants assigned their debt to Mr. Quilter. The consideration stated in the indenture was the sum of 5*s.* in the pound in cash and the bill of exchange for 389*L.* 1*s.* 9*d.*, being at the rate of 5*s.* in the pound.

The plaintiff subsequently, in 1857, called a meeting of his creditors, and, together with Mr. Peter Rolt, his father-in-law, offered a composition of 4*s.* in the pound, including a dividend of 1*s.* 6*d.* then in course of payment, which was accepted by nine-tenths in number and value of the creditors present. A second meeting was held according to the provisions of the Act for the purpose of deciding on such offer, and such composition was accepted by nine-tenths in number and value of the creditors present, and thereupon the Court by an order under the Act, dated the 24th of November, 1857, annulled the adjudication of bankruptcy.

The creditors at such meeting were not informed or aware of the arrangement that had been made with the defendants.

On the 4th of December, 1856, the bill of exchange was dishonoured, and the defendants on the 24th of December, commenced an action on it for the principal and interest, and on the 8th of September, 1857, final judgment was signed.

On the 17th of May, 1859, the plaintiff filed his bill.

On the 26th of May, 1859, the Vice-Chancellor granted an injunction restraining the defendants from enforcing the judgment they had obtained against the plaintiff on the said bill of exchange (*a*).

(*a*) Subjoined are the 230th & c. 106, and the 116th, 117th, and 231st sections of the Bankrupt 118th rules, which are in force Consolidation Act, 12 & 13 Vic. under these sections.

The case now came on on a motion for a decree.

Mr. *Craig* and Mr. *Caldecott* for the plaintiff.

The principle of the bankrupt law is that all the creditors should stand on the same footing, and every secret arrangement, having for its object to give one creditor an advantage over the others, is fraudulent and void. Here, in order to induce the defendants to concur in a proposed arrangement, or to assign their debt to another for the purpose of concurring in such arrangement, the plaintiff gave the defendants the promissory note on which they

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Sec. 230 of Bankrupt Consolidation Act, 12 & 13 Vic. c. 106 :—

“That any bankrupt at any time after he shall have passed his last examination, may call a meeting of his creditors, whereof (and of the purport whereof) twenty-one days’ notice shall be given in the *London Gazette*, and if the bankrupt or his friends shall make an offer of composition, and nine-tenths in number and value of the creditors assembled at such meeting shall agree to accept the same, another meeting for the purpose of deciding upon such offer shall be appointed to be holden, whereof such notice shall be given as aforesaid; and if at such second meeting nine-tenths in number and value of the creditors then present shall also agree to accept such offer, the Court shall and may, upon such acceptance being testified by them in writing, and upon payment of such sum as the Court shall direct, annul the adjudication of bankruptcy, and supersede or dismise the fiat or pe-

tition for adjudication, and every creditor of such bankrupt shall be bound to accept of such composition so agreed to.

Section 231: “That in deciding upon the offer of composition no creditor whose debt is below 20*l.* shall be reckoned in number, but the debt due to such creditor shall be computed in value, and every creditor to the amount of 50*l.* and upwards residing out of England shall be personally served with a copy of the notice of the meeting to decide upon such offer as aforesaid, and of the purpose for which the same is called, so long before such meeting as that he shall have time to vote thereat, and such creditor shall be entitled to vote by letter of attorney, executed and attested in manner required for a creditor’s voting in the choice of assignees. And if any creditor shall agree to accept any gratuity or higher composition for assenting to such offer, he shall forfeit the debt due to him, together with such gratuity or composition,

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had sued. It was submitted that such note was void at law. In *Jackman v. Mitchell* (a) a bond given to one creditor to secure the deficiency of a composition without the knowledge of the other creditors was decreed to be given up to be cancelled, with costs; and it was immaterial that this was at the instance of the plaintiff, who was *particeps criminis*; as in these cases the relief is given, not on account of the individual, but of the public.

In *Cockshott v. Bennett* (b), where the creditors of an insolvent consented to accept a composition of their respective debts, on an assignment of the insolvent's effects by a deed to which all were parties, but one of them,

and the bankrupt shall, if thereto required, make oath before the Court that there has been no such transaction between him or any person with his privity and any of his creditors, and that he has not used any undue means or influence with them to attain such assent."

Section 284 authorizes the assignees to sue for such forfeiture.

The following are the rules in force as to a composition under these sections.

Rule 116: "That at the first of the meetings of creditors directed by the statute to be held a minute shall be taken by the solicitor to the assignees of the names of the several creditors present and the amount of their several debts standing in proof upon the proceedings, distinguishing such of them as shall assent to such composition."

Rule 117: "That the second of the said meetings shall be held before the commissioner, and that at such meeting the said com-

missioner shall, by deposition of witnesses and documentary evidence as to him shall appear to be proper, inquire and ascertain whether the several particulars, directed by the statute to be performed previous to the holding of such second meeting, have been duly performed, and certify the same, together with the proceedings which shall have taken place at such second meeting."

Rule 118: "That for the better information of all parties interested the certificate of the commissioner shall state what proportion in number and value the creditors assenting to the composition bear to the creditors who shall have proved debts to the amount of 20*l.* and upwards under the fiat or petition, and also whether any sale has been made of the bankrupt's estate, in order that provision may, if expedient, be made for confirming the same."

(a) 13 Ves. 581.

(b) 2 T. R. 763.

before executing, obtained from the insolvent, by refusing to execute, a promissory note for the balance of his debt, the Court held the note void at law as a fraud on the other creditors, and held a subsequent promise to pay it as without consideration. In *Wells v. Girling (a)*, where a promissory note was given by a trader to a stranger, who undertook to induce his creditors to agree to a composition, which failed, the Court held the transaction and the note void.

Here the debt was assigned to Quilter with that fraudulent intention against which the statute was mainly directed.

Chesterfield v. Janssen (b), *Higgins v. Pitt (c)*, and *Spurrett v. Spiller (d)* were also cited.

Mr. *Malins* and Mr. *Marten* for the defendants.

On these grounds the plaintiff's case must fail—

First, because the transaction of which he complains does not come within the spirit or letter of the statute. The plaintiff's object was to supersede the bankruptcy, and with that object he was at perfect liberty to go about among his creditors and to make the best bargain he could with each creditor. He was not proceeding under the arrangement clauses at all. In May, 1856, the plaintiff had agreed to assign his debt, and it was not till 1857 that the general notice to creditors was given.

But an arrangement by which one creditor obtained advantage over others was not necessarily invalid and void. In *Lee v. Lockhart (e)* an arrangement which preserved priority to a mortgagee was sustained.

Secondly, the plaintiff ought to have raised the objection at law, where it would have had the same weight given to it as in this court.

(a) 1 Bro. & B. 447.

(b) 1 Atk 301.

(c) 4 Ex. 312.

(d) 1 Atk. 105.

(e) 3 M. & C. 302.

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Thirdly, the delay was an answer to the bill. The transaction complained of took place in May, 1856, and it was not till March, 1859, that the bill was filed.

The VICE-CHANCELLOR:—

I am sorry that a case of this kind should come before the Court, because neither the plaintiff nor the defendant makes a good figure. They made a secret underhand bargain, by which the defendant gained a greater advantage than the other creditors of the plaintiff under the bankruptcy; and the plaintiff, after gaining the advantage of that underhand bargain, has come to this Court to have it set aside on the ground of its illegality. He says he did not know that it was illegal, The defendant says, and properly enough, that he is indignant at the notion that he should be concerned in any transaction to which the epithet "fraudulent" can be applied in this Court.

The principles of this Court, which stamp a transaction of this kind with illegality, are not of any very refined kind. They are consistent with the ordinary principles of morality recognised by all mankind. And, moreover, where the Court has interfered to set aside such a transaction, it has done so on the ground of public policy, and of the transaction being such as the law should, in the highest degree, discountenance.

The object of the bankrupt laws is to secure an equal distribution of property among the creditors, so that none shall have any advantage over another. The plaintiff has had the benefit of the bankrupt laws. He has been dismissed from the Court of Bankruptcy upon a solemn arrangement made and sanctioned by the commissioner, under two sections of the Bankrupt Act, and on a declaration made upon the authority of the commissioner that all the creditors who had proved under that bankruptcy have

received a dividend of four shillings in the pound. A meeting was held, at which that dividend, according to the terms of the statute, was sanctioned by the majority of the creditors present. Now it turns out that, in fact, the defendant, a considerable creditor, has received, not, according to the record in bankruptcy, four shillings in the pound, which has solemnly been declared by the commissioner to have been the amount paid to every creditor—but a large additional sum, secured by a bill of exchange, on which he is suing at law. Thus, by a private bargain between the bankrupt plaintiff and this single creditor the defendant, that equality of distribution which is the object of the Bankrupt Laws has been violated. The law upon the subject is laid down in the clearest way in the reports and text-book. In a valuable text-book, the work of a very learned member of the Chancery bar, now dead—I mean Mr. Adams—treating of the cases in which this court treats non-disclosure of circumstances as equivalent to fraud, he expresses very well the principle which applies to the case of compositions by a debtor with his creditors, where a secret bargain has been made with particular creditors. This he says at page 179 of his work: “The very circumstance that some creditors have already executed is an inducement to the rest to follow their example. The reason why they have so executed can only be known to the other creditors from the representations of the debtor, and, if the real reason is the result of any secret arrangement, the influence of their example is a fraud on the rest. All such secret arrangements, therefore, are utterly void. They cannot be enforced even against the debtor himself, and money paid under them may be recovered back, as having been obtained against the clear principles of public policy.” That results from this obvious principle, that where the deed of composition contemplates a distribution equally among the creditors, a private bargain of this kind, not communicated to the other creditors, is vicious, and will be set

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aside by a Court of Equity. With reference to the bankrupt laws, the proposition is of still higher importance, if possible, than as regards deeds of composition; because the bankrupt laws are enacted upon a high principle of public policy, to prevent fraud by an unequal distribution of a bankrupt's property among his creditors. Therefore it is, that the 231st section of the Bankrupt Act, following the 230th, which allows arrangements for superseding bankruptcies upon the payment of a composition approved of at a meeting of creditors, positively enacts, with reference to this principle, "that if any creditor shall agree to accept any gratuity or higher composition for assenting to such offer, he shall forfeit the debt due to him, together with the gratuity and composition." That section does not enact the law which makes the transaction illegal, because the law is well established already; but it imposes a penalty upon the creditor who shall have consented to accept, on a private bargain, a gratuity or a secret advantage of that particular kind.

But it is said, in this case, that it is not within the principle of law at all; because at the time when this private bargain was made there was no contemplation of an appeal to these two sections of the Bankruptcy Act, and no notion of a general annulling of the bankruptcy upon the terms of a composition of four shillings in the pound. And it has been argued, that the bankrupt, or any creditor, might make any private bargain he pleased, after the bankruptcy, without violating the law or the principles of equity in any respect. Moreover, it is said that this bankrupt might have bought off the debt of every creditor upon what terms he pleased, and so have obtained the annulling of the bankruptcy, without any reference to the composition or arrangement clauses at all. I am far from admitting that he might or could. On the contrary, I think he could not; for this obvious reason, that if the purpose of the bankrupt law be to insure an equality of

distribution, unless the Court be perfectly satisfied that each creditor knew what every other creditor was to receive, there would be a violation of that equality which the bankrupt law contemplates. But here the question arises, and it is one of very considerable importance, on the 231st section, for it is said that it was after this bargain that the bankrupt thought of resorting to the composition clauses; and, moreover, that the defendant who accepted this large composition neither attended the meeting nor assented to the proposal of a composition of four shillings in the pound at all. None of these objections can have weight if the principle of the law be attended to. What is required in order to carry out an arrangement under this clause, and what was actually done in this case? A meeting was held, to which it was necessary to summon all the creditors. A majority, as defined by the statute, of the creditors present at the meeting, may bind all the rest; but the principle of the Act is just as much violated by buying off the attendance of a creditor at that meeting as by any other course of proceeding. To pay a man ten shillings in the pound, in order that he shall attend a meeting and assent to a composition of four shillings in the pound, is one thing; to pay a man ten shillings in the pound to get quit of his claim, so that he should never attend the meeting at all, is, in its effect, with reference to the principle of the Act, exactly the same, because by the private bargain there is this inferred—that the creditor who is bought off absolutely will never disturb any arrangement under this clause. And if the Court finds that ultimately an arrangement was made under these clauses, and that the commissioner in bankruptcy and the creditors all agreed to accept four shillings in the pound (and all who did attend at the meeting were bound to accept four shillings in the pound), and that thus the bankruptcy was got rid of on the notion that the bankrupt's estate was distributed to the creditors

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under an arrangement that every creditor should receive four shillings in the pound, the moment you come to a private bargain, by which one creditor who has proved under the bankruptcy has received ten shillings in the pound, the principle is violated and the transaction is illegal.

Therefore the clause which speaks "of the consent of the creditors," and, "if creditors shall agree to accept a gratuity or composition for assenting to an offer," although these words are only introduced with a view to operate upon the clauses of forfeiture, in principle does not require that there shall be a formal bargain that the creditor shall attend to assent at the meeting, if his right to dispute the transaction, that is, his claim as a creditor, is bought off upon unequal terms. The case, therefore, is one in which, upon the most broad and general view of it, the transaction must be set aside.

But the other features of the transaction are not of an agreeable kind, for it is not a seemly thing that a bankrupt should address any creditor, and tell him, as this plaintiff told these defendants in his letter of the 25th of April, 1856, that other creditors had agreed to accept five shillings in the pound, but that for certain private reasons the defendants should be favoured creditors, and that they should get ten shillings in the pound. No man has a right in this court to say—if he knows that the bankruptcy laws have been invoked, where equality and fairness are of the essence of the distribution to take place—no man has a right to say that he is acting in a proper way when he listens to a proposal of this kind, still less when he acts upon it; nor can I hear of any defence in this court, to be countenanced as a valid defence of such conduct as this, as regards the assignment of this debt. Two persons who are partners appear as the active agents in this transaction, and I think that the stamp of reprobation should be placed on those who interfere for purposes such as these persons appear to have interfered for in this case. What is it that

they do? After a bargain to give ten shillings in the pound, an assignment is made to one of them, which expresses a false consideration, and states, that he is assignee of all the rights of Messrs. Sandford, the defendants in this case, who have proved as creditors, in consideration of five shillings in the pound, when they knew that there was an additional five shillings in the pound secured by a bill of exchange. I hope to see no such case appear in this court again on proceedings in bankruptcy. I am afraid there is too much reason to apprehend that such proceedings are not uncommon. But I would not have it supposed for one moment that, when they appear and are disclosed, they are not to meet with that reprobation which not only commercial men who are disposed to entertain high notions of credit and of character in their dealings, but which any man of common sense, with the ordinary instincts of morality, must conceive they deserve. Not only was there a private bargain, but there was a false record of that private bargain, and the rest of the proceedings in bankruptcy were carried out with the full concurrence of the assignee of the debt, and on the footing that these unfortunate creditors, who have been thus abused and defrauded by persons acting apparently under the sanction of the Bankrupt Act, were put off with four shillings in the pound, while these agents were cognizant of the fact that these defendants were moving about with ten shillings in the pound in their pocket. I shall think it my duty to communicate to the Lord Chancellor, as the head of the Court, the nature of this transaction, and it will be for him to say what he thinks should be done with reference to such a proceeding.

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Mr. Craig, Q.C., asked for costs on the authority of *Jackman v. Mitchell*, before Lord Eldon.

THE VICE-CHANCELLOR.—I shall give you costs; but that I do, not from the merits of the plaintiff, which are

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very small, but from the demerit of the defendants, and because, as Lord Eldon said, the transaction is so much against public policy that the Court has always, when such transactions occur, felt it its duty to stamp its reprobation of the transaction by giving costs.

Mr. *Malins*, *Q.C.*, observed that the assignees in question were absent, and were not represented in any way.

The VICE-CHANCELLOR.—I quite understand that they are the agents by whom the bargain was made in this case.

Order the bill of exchange to be delivered up, and declare that the said bill was illegal and void in the hands of the defendants; order the defendants to enter up satisfaction on the judgment; the injunction to be made perpetual, in the terms of the third paragraph of the prayer of the bill; the costs to be paid by the defendants.

June 13, 15,
 17, 1859.
 Jan. 13, 1860.

WHEELER v. SMITH.

More than
 fifteen years
 before his
 death a testa-
 tor purchased
 two South-
 ampton Pier

GEORGE WHEELER, late of Southampton, in 1838 purchased from the Southampton Pier Commissioners two bonds dated the 22d of September, 1838, for 500*l.* each bonds for 500*l.* each, having, before the purchase, told the plaintiff that he had left her by his will more than her sisters, to enable her to subscribe to some charities, and, very soon after the purchase, that he had invested the 1000*l.* in the pier bonds in her and his own name, but did not mention any trust or purpose. He privately applied the interest in subscribing to certain charities, and, fourteen years after the purchase, mentioned in several letters the charities to which he wished her to apply the interest, but said he did not intend to bind her by any legal document.—*Held*, that no valid trust was created, and no resulting trust, but that the sister was entitled to the fund.

A voluntary grant of property *inter vivos* with the expression of a wish as to the way in which the grantee should apply it, but with a declaration that no legal obligation was imposed, does not make the grantee a trustee, and the expression of the wish without imposing an obligation is enough to rebut the resulting trust for want of any consideration moving from the grantee.

Gift of property *inter vivos*, accompanied by expression of a mere wish by the grantor as to the mode of employing the property, and his declaration that no legal obligation as to that mode of employment is intended to be imposed: in such a case no trust results to the grantor for want of valuable consideration.

on the credit of the rates and duties on which the commissioners, under 43 Geo. 3, c. 24, were empowered to borrow money (section 24).

Previously to the date of the bonds George Wheeler told his sister (the plaintiff) that he had by a codicil to his will bequeathed to her 1000*l.* more than to his other sisters, to enable her to subscribe to some private charities he had omitted to mention in his will, and in a letter dated the 8th of March, 1858, after referring to such bequest, he said he wished his sister, after his death, would subscribe 5*l.* 5*s.* a year to the Lying-in Institution of Southampton.

In a letter to the plaintiff, dated the 20th of August, 1838, he wrote as follows:—

“You know some time ago I communicated to you that I had left 1000*l.* in a codicil more to you than to either of my other sisters. I have lent the said 1000*l.* and 500*l.* more to the Old Pier Commissioners upon bonds bearing an interest of 5*l.* per cent. I shall order the said 1000*l.* to be placed in my name and yours.”

On the 6th of February, 1849, he wrote thus:—

“So many of my pensioners have fallen that I have given you written directions, which are in possession of my bankers and friends Messrs. Maddison & Pearce, desiring you to continue the allowance of 10*l.* per annum to our cousins Smith on behalf of the Wheeler family, or in your own name, as you may think proper. And also five guineas per annum to the Dispensary of this place, to be subscribed in the following manner: two guineas as the subscription of Mr. Sheepcott, two guineas for J. R. Stebbing, and one guinea in the name of Julia Wheeler, my wife. I know I can depend upon you to fulfil all my wishes with regard to these charitable bequests without including them in my will or my other legal documents.”

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1850. . On the 11th of March, 1849, he wrote as follows:—

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“ I told you I had *directed* you by a letter (which is left with my bankers, Messrs. Maddison and Pearce) that I had requested you to distribute, after it shall please Divine Providence to remove me from this world, certain annual amounts to be distributed. I think it is right to name them:—

	£	s.
All Saints National School	5	0
R., M., E., and Cassandra Smith	10	0
Lying-in Institution	5	5
Dispensary, Southampton	5	5
Royal British School, Southampton	10	0
Infirmary, Southampton	5	5
St. Mary's National School, Southampton	5	0

“ These sums amount to 45*l.* 15*s.*, which is nearly the whole amount of interest derived from the two 500*l.* bonds of the Old Pier Commissioners of Southampton. I know that I have appropriated such amount in a way quite satisfactory to what I consider my duty. Several of the institutions I have been a liberal contributor to for their building. I do this fully depending that you will carry out my wishes, and when it shall please Providence to call you away, I have no doubt that you will so order it may be carried on by those who succeed you.”

George Wheeler died on the 6th of November, 1853. After his decease the following letter was found among his papers, accompanied by a schedule:—

My dear sister, Elizabeth Wheeler,—Some time since I purchased two of the Southampton Pier Bonds, of 500*l.* each, and had them transferred into my own name and your name; consequently on my decease they will survive

to you. The dividends on these bonds amount to 47*l.* 17*s.*, and have been used by me for various charitable purposes. I wish such donations to be continued after my decease according to the within list, written and signed by me, or as near thereto as circumstances will permit. The whole of the dividends, with the exception of the 10*l.* per annum to the Smith family, will be paid through my brother Samuel, as heretofore. Should the pier bonds be paid off, or the interest reduced to 4*l.* per cent., then in the former case I recommend you to purchase Bristol and Birmingham Guaranteed Stock with the amount, and in either of the above cases as the interest will be reduced, then the two last donations on the list, viz., 5*l.* to All Saints National School and 5*l.* to St. Mary's School, will be discontinued. Should there be any trifling overplus of dividends or interest more than sufficient to answer the above purposes, you will distribute the same in charity as you may think proper. I have not put the above into any formal document, feeling confident that you will have pleasure in carrying out my wishes.

(Signed) "GEORGE WHEELER."

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It appeared that some time in 1853 he had addressed the following letter to his solicitors:—

"Messrs. Maddison and Pearce,—You have an old bond in your possession, standing in the names of George and Elizabeth Wheeler, for 1000*l.*, upon which you have been accustomed to receive the dividend. Now, when it shall please God to remove me from this world, I request that you will continue to do the same, and apply it in the following ways, viz.—10*l.* per annum to Messrs. Wheeler & Co., on account of R. M. and E. Smith; 10*l.* per annum to the treasurer of the Royal British School, for the payment of a monitor; 6*l.* 6*s.* per annum to the treasurer of the Infirmary; 6*l.* 6*s.* per annum to the treasurer of the

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Dispensary; 5*l.* 5*s.* per annum to the treasurer of the Lying-in Institution; and, in the event of the bond continuing to produce 5*l.* per cent., I desire that 5*l.* per annum be paid to the treasurer of the National Schools in St. Michael's parish; and 5*l.* per annum to the treasurer of the National Schools about to be erected in St. Mary's parish.

(Signed) "GEORGE WHEELER."

George Wheeler made his will with no less than eight codicils, but the will was silent as to the said bonds. He appointed the defendants R. T. and H. Wheeler his executors and trustees of his will. After his death Elizabeth Wheeler received the interest on the bonds and paid it to the Smiths and to the charities as mentioned in George Wheeler's letters for about two years after his death, when she was advised by counsel that the gift to the charities was void under the Mortmain Acts, and discontinued the payments to them. After some correspondence and offers by her, one of the trustees of the charities in March, 1858, gave notice to the pier commissioners not to pay principal or interest to her. In December, 1858, she filed her bill against the Smiths, the trustees of the charities, the executors of George Wheeler's will, and the Attorney-General, stating the facts as above mentioned, and that the plaintiff was desirous of obtaining the protection of the Court with respect to the administration of the bonds, and claiming on her own behalf such interest (if any) as the Court might consider her entitled to, praying that the rights and interests of all parties in the said bonds might be ascertained and declared, and that the trusts of the pier bonds might be executed under the direction of the Court.

Mr. C. Barber and Mr. Daunev, for the plaintiff, cited *Wallgrave v. Tebbs* (a).

(a) 2 K. & J. 313.

Mr. *Torriano*, for the Smiths, contended that there was a valid trust declared by the letters, and that the plaintiff was bound by them.

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Mr. *Malins* and Mr. *Marett* for the charities.

These letters constitute a trust binding on the plaintiff. Can it be contended that Miss Wheeler could have claimed them against her brother during his life; and what difference can his death make? The directions in the letters are positive. In *Rider v. Kidder* (a), stock was purchased by A in the name of A and B, and B was held a trustee for A's executors. *Ellison v. Ellison* (b), *Ex parte Pye* (c), are to a similar effect. Here an actual trust is created: *Pulvertoft v. Pulvertoft* (d), *Kekewich v. Manning* (e), *Edwards v. Jones* (f), *Airey v. Hall* (g), *Chester v. Urwick* (h), *Lomax v. Ripley* (i), are very similar cases. Moreover, the plaintiff has acted on the directions in the letters, and has paid the interest and so accepted the trust. The prayer of the bill is on that understanding.

Mr. *Jessel*, for the executors of George Wheeler, contended that there was a valid trust declared, but that the part relating to the charities failed, and so that portion of the money went to the executors: *Dyer v. Dyer* (k), *Harding v. Glyn* (l); the letters show she was not to take any personal interest—she was to give the overplus in charity; after his death she is to appoint trustees; no option is given to her. Precatory words far less imperative than these have been held binding: *Wood v. Cox* (m), *Paine v. Hall* (n), *Tee v. Ferris* (o).

(a) 10 Ves. 360.

(b) 6 Ves. 656.

(c) 18 Ves. 140.

(d) 18 Ves. 84.

(e) 1 De G. M. & G. 176.

(f) 1 M. & Cr. 228.

(g) 3 Sm. & G. 315.

(h) 23 Beav. 407.

(i) 3 Sm. & G. 48.

(k) 2 Cox, 92.

(l) 1 Atk. 469.

(m) 2 M. & C. 684.

(n) 18 Ves. 475.

(o) 2 K. & J. 357.

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Mr. Wickens appeared for the Attorney-General.

Mr. C. Barber was heard in reply.

The VICE-CHANCELLOR:—

The plaintiff in this case is entitled, by survivorship, to the entire legal interest in the two bonds for 500*l.* each granted by the Southampton Pier Commissioners to the plaintiff and her deceased brother. These bonds were purchased by her brother in the month of September, 1838. On the face of the bonds they are granted in consideration of the money expressed to be advanced and lent by the plaintiff and her brother, but in fact the whole of the money was advanced and lent by the brother.

Three of the defendants are the executors of the brother, who claim the bonds as part of his assets on the principle that a trust or beneficial interest resulted to the brother, who advanced the whole of the money, inasmuch as no valid trust was declared. The other defendants are the trustees of certain charities, who insist that they are entitled, as on a trust sufficiently declared, to the greater part of the interest accruing on the bonds. Two others of the defendants are relations of the testator, to whom he had in his lifetime paid a small proportion of the

NOTE.—Mr. Lewin says, p. 181, 3d edition:—

“A trust results where the intention not to benefit the grantee is expressed—as if it be a grant upon trust, and no trust is declared, or the trust declared is too vague to be executed—upon trusts, void for unlawfulness, or upon trusts to be thereafter declared and none is declared.”

In these cases the trust results not by presumption of law, but by force of the written instrument,

and therefore parol or extrinsic evidence is not admissible to rebut it. See *Langham v. Sandford*, 17 Ves. 442; 19 Ves. 643; *Racke-field v. Careless*, 2 P. Wms. 158; *Gladding v. Yapp*, 5 Mad. 59; *White v. Evans*, 4 Ves. 21; *Walton v. Walton*, 14 Ves. 322. The principle is, that by the use of the word *trust* all notion of a beneficial interest in the person in whom the property is vested must be excluded. See *Eloock v. Mapp*, 3 Ho. of Lds. Ca. 492.

interest on the bonds, and they now claim to be *cestuis que trust* and entitled as such to compel the plaintiff to continue the payment of the interest to the same amount as had been paid by the testator.

On the evidence, it seems certain that the testator's intention was, that if his sister survived him she should be the proprietor of the bonds, in order that she might have the means of continuing the annual subscriptions to the charities, and the small annual payment to the relations.

The executors insist that they are entitled as on a resulting trust, because the Statute of Mortmain makes void the trust in favour of the charities. But the first material question is, whether any trust whatever has been impressed upon these two bonds, which at law are now the absolute property of the plaintiff.

Previously to the purchase of the bonds the testator had written a letter to the plaintiff, telling her that he had, by a codicil to his will, left her 1000*l.* more than to any of his other sisters, to enable her to subscribe to some private charities. Some months afterwards, and on the 20th of August, 1838, he writes to her again, announcing the purchase of the bonds, saying that he had lent the 1000*l.* to the pier commissioners, and adds (a passage not inserted in the bill) these words—"I shall order the said 1000*l.* to be placed in my name and yours."

These are very important words. They are the first information which he gave to the plaintiff of the right which he had conferred on her, and they are wholly unaccompanied by the mention of any trust or purpose whatever. No charity is mentioned in that letter. Taken in connection with what he had previously said, and with his letter of the 8th of March, 1838, there is quite enough to rebut any presumption that she was to take a mere legal title, with a trust or beneficial interest resulting to himself. Nor does there seem to be enough to create any trust in favour of the charity. Giving a sum of money in

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order that the donee may have the ability to subscribe to certain charities has never been held to amount to a trust in favour of the charities.

From the year 1838, when the right of property was conferred on the plaintiff by the creation of the joint tenancy down to the year 1849, the case is wholly without evidence to prove that any valid trust was created or attached to the plaintiff's legal interest.

In such a state of the legal right it is not easy to see how anything short of an absolute declaration or acknowledgment by her could create any valid trust or solid obligation, as the property had vested in her unfettered by any contemporaneous declaration sufficient to create a trust. But the case is wholly destitute of anything in the shape of declaration or undertaking on her part sufficient to create or raise, by implication, any trust or obligation.

It was argued that the letter of the 6th of February, 1849, contained expressions amounting to a valid declaration of trust.

That letter and the other letter of the 11th of March, 1849, were both communicated to the plaintiff. Even if these documents had contained the most imperative and mandatory expressions, there was no resulting trust on which they could operate, and they produced no declaration or undertaking on her part which could fasten a trust. They are dated nearly eleven years after she had acquired the legal title unfettered by any trust.

But even if these letters had been contemporaneous with the legal right which he conferred, the fair construction of the language reduces them to something far short of the imperative force of a declaration of trust. The strongest words are:—"I have given you written directions, which are in possession of my bankers, desiring you to continue the allowance of 10*l.* per annum to our cousins Smiths on behalf of the Wheeler family, or in your own name, as you may think proper."

If there were any doubt that these words are not sufficiently imperative to raise a trust enforceable as a valid obligation, the subsequent words clearly show that he did not intend to impose any legal obligation; for, after mentioning the other charities, in order to show that he wished to rely on her voluntary act, he says:—"I know I can depend upon you to fulfil all my wishes with regard to these charitable bequests, without including them in my will or in any legal document."

This language is an express declaration that he did not mean to create a trust. The letter of the 11th of February, 1853, was found among his papers after his death, and never communicated to the plaintiff during his lifetime, and is wholly inoperative as binding her to anything; but it is good evidence to rebut any resulting trust, because it shows what were his wishes, and in the very first sentence of the letter he recognises the right of property which he had conferred on her so many years before by taking the bonds in her name, saying, "on my death they will survive to you."

Where there is a gift of property not testamentary, but granted by one living person to another, and the grant is accompanied with the expression of a wish as to the mode of employing it, and at the same time with a declaration that no legal obligation is intended to be imposed, the evidence of the want of any consideration moving from the grantee cannot raise a resulting trust, because the clear intention is shown to be that the dominion of the property should remain in the grantee. The disappointment of a mere wish or expectation cannot be a reason for the trust resulting where the dominion of the property was conferred on the grantee with a mere option or power to fulfil a wish which the grantor declared should not be considered as a binding obligation. The evidence of such a declared purpose in the grantor rebuts and contradicts the notion that the property was to result to himself.

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On a fair consideration of the whole of the evidence in this case, there seems no doubt as to the real nature of the transaction, and of the object of the testator in conferring the right of property in these bonds on the plaintiff by his own act so many years before his death. The transaction amounts to this:—That he expressed his wishes, but refrained from exacting any promise or declaration to bind her; and that he meant her to hold the bonds as he had held them himself, and to impose no trust upon her in respect to them more than he had imposed upon himself. Voluntarily, in a spirit of charity, during their joint lives, he applied the interest receivable on the bonds for the charitable purposes which he specifies. His desire seems to have been that she, when and if she survived him, should apply the interest for the same purposes, but not under any obligation stronger than that which bound himself. His confidence was that in the free and voluntary spirit of Christian charity she would do as he had done, unconstrained by any legal obligation. He shows no intention to deprive her of the merit of bestowing it freely and voluntarily, as he had bestowed it himself.

What he says in his letter of the 6th of February, 1849, shows that he knew he could by a legal document have made it compulsory. But that was not what he meant.

Lord Cottenham, in the House of Lords, in the case of *Knight v. Boughton* (a), said, that “an act which is to depend on the sense of justice of another must be discretionary in the person from whom it is to proceed.”

As it seems to be the correct view of this case that the plaintiff acquired a property in these bonds by the act of her brother the testator many years before his death, without the creation of any trust, it follows that there could be no resulting trust by reason of the Statute of Mortmain.

The litigation in this case is unfortunate. It seems to have been occasioned by the unwise course adopted by

(a) 11 Cl. & Fin. 553.

the trustees of the charities. There are some words in the prayer of the bill which were relied on during the argument as amounting to an acknowledgment by the plaintiff that she held the bonds as a mere trustee. But those words seem introduced merely to meet the possible view of the Court; and in the eighteenth paragraph of the bill there is an express claim of such interest, if any, as the Court might consider her to have in the bonds.

There must be a declaration that the plaintiff has become entitled to the bonds and the money secured by them by survivorship, without being subject to any trust.

The plaintiff consenting to pay the costs of the defendants Smiths, the other parties, who by their claims produced the litigation, must bear their own costs.

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COLLARD v. ROE.

Nov. 22.

BY a decree in the suit, dated the 8th of March, 1858, it was ordered that an agreement for the purchase of a certain estate should be specifically performed. The usual reference was made to chambers, and on the 26th of June, 1858, the chief clerk certified that there was due from the defendant 43*l.* 16*s.* 8*d.*

The executors of a deceased defendant against whom an order was made for payment of a sum of money found due by the certificate, having refused to pay, the

plaintiff, before the refusal, obtained the common order to revive, and after the refusal filed a supplemental bill against the executors.—*Held*, that the course pursued was not irregular, and that the form of order in *Edwards v. Batley* (a), calling on the executors to admit assets or account, was not intended to supersede in all cases the ordinary course of practice.

(a) 19 Beav. 437.

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Statement.

By an order dated the 12th of November, 1858, made on further consideration, it was ordered that the defendant on or before the first day of Easter Term, do pay to the plaintiff the sum of 43*l.* 16*s.* 8*d.*, and that the plaintiff's costs be taxed and paid by the defendant.

Before the order was drawn up, the defendant J. C. Roe died, having appointed R. Roe and R. M. Riccard his executors and devisees of his real estate, who duly proved his will.

The suit having abated, the plaintiff obtained the common order to revive against the executors.

The executors having refused to pay the amount found due and the costs, on the 26th of March, 1859, the plaintiff's solicitors wrote to the town agent of the defendants as follows:—

“ 11, Serjeant's Inn, Fleet Street.

“ *Collard v. Roe.*

“ Dear Sir,—I am advised by counsel that, unless your clients, the executors of the defendant John Colwell Roe, will consent without further proceedings to pay the plaintiff the sum of 43*l.* 16*s.* 8*d.* found due to him by the chief clerk's certificate, and also the costs of the suit subsequent to the decree as ordered by the order of his Honour the V.C. Stuart, it will be necessary to file a new bill against the representatives of the late Mr. J. Colwell Roe, to obtain an order for payment by the representative of the sum of 43*l.* 16*s.* 8*d.* and the above-mentioned costs. I shall feel obliged by your informing me whether the representatives of the late Mr. J. Colwell Roe are prepared to pay the sum of 43*l.* 16*s.* 8*d.* and the costs, without putting my client to the annoyance and expense of filing a new bill for such a trifling sum, and where in fact there is nothing in contest.

“ Yours truly,

“ THOMAS SISMEY.”

On the 18th of April, 1859, the plaintiff filed this supplemental bill to enforce payment.

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Argument.

Mr. *Malins* and Mr. *Karslake*, for the plaintiff, asked for a decree for payment of the sum of 43*l.* 16*s.* 8*d.* and the costs of that suit, as well as of the costs of the supplemental suit which the conduct of the defendant had made necessary.

Mr. *Craig* for the defendants.

It is not denied that the plaintiff is entitled to an order for payment of the amount ordered to be paid by the decree, and for the costs of that suit; but the question to be determined is, whether he ought not to pay the costs of this supplemental suit, which was vexatious and unnecessary.

All that the plaintiff required to enable him to receive the money against the executors, was to get an order to revive in the form of that made in *Edwards v. Batley (a)*, which revived the suit and required the executors to admit assets, or to submit to an account. Had such an order been obtained, the suit would have been unnecessary. But to file a supplemental bill was in effect to repeal the 52d section of the Act (15 & 16 Vic. c. 86) (*b*).

(*a*) 19 Beav. 457.

(*b*) "Upon any suit in the said court becoming abated by death, marriage, or otherwise, or defective by reason of some change or transmission of interest or liability, it shall not be necessary to exhibit any bill of revivor or supplemental bill in order to obtain the usual order to revive such suit, or the usual or necessary decree or order to carry on the proceedings. But an order to the effect of the usual order to revive, or of the usual supplemental

decree may be obtained as of course upon an allegation of the abatement of such suit, or of the same having become defective, and of the change or transmission of interest or liability, and an order so obtained when served upon the party or parties, who according to the present practice of the said Court would be defendant or defendants, to the bill of revivor or supplemental bill, shall from the time of such service be binding upon such party or parties in the same man-

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Seton on Decrees, pp. 601—4, was also cited. See *The Dean of Ely v. Gayford* (a).

The VICE-CHANCELLOR:—

The objection is, that instead of proceeding by the order to revive the plaintiff has filed a supplemental bill.

The plaintiff obtained the common order to revive, which at that time it is not suggested was irregular or improper. There was not then any necessity for extending it, unless the plaintiff could have foreseen that the executors were likely to refuse payment.

The defendants' case is, that the plaintiff ought to have obtained a second order in the form of that made in *Edwards v. Batley*, in which, after the order to revive. the order proceeds to direct that the executors should admit assets or submit to an account. But this was not a case for an account at all; the decree directed simple payment of a sum of money and the costs of the suit.

ner in every respect, as if such order had been regularly obtained according to the existing practice of the said Court, and such party or parties shall thenceforth become a party or parties to the suit, and shall be bound to enter an appearance thereto in the office of the clerk of records and writs within such time and in like manner, as if he or they had been duly served with process to appear to a bill of revivor or supplemental bill filed against him, provided that it shall be open to the party or parties so served within such time after service as shall be in that behalf prescribed by any general order of the Lord Chancellor, to apply to the Court by motion or petition

to discharge such order on any ground which would have been open to him on a bill, or revivor, or supplemental bill, stating the previous proceedings in the suit, and the alleged change or transmission of interest or liability, and praying the usual relief consequent thereon: provided also, that if any party so served shall be under any disability other than coverture, such order shall be of no force or effect as against such party until a guardian or guardians *ad litem* shall have been duly appointed for such party and such time shall have elapsed thereafter as shall be prescribed by any general order of the Lord Chancellor on that behalf."

(a) 16 Beav. 561.

The first order was regular, and, but for the conduct of the defendants, would have been quite sufficient to have enabled the plaintiff to obtain his money, and the defendants cannot therefore be heard to say that the suit is improper, when their own conduct alone made it necessary.

It should also be borne in mind that the proceeding by an administration summons, or by the form of order made in *Edwards v. Batley*, and in similar cases which are designed to save expense and delay, and which in many cases are most beneficial, do not deprive the suitor of the right to file a bill in a case where there is risk that the short forms may fail to obtain redress. There must be a decree for payment of the 43*l.* 16*s.* 8*d.*, and for the taxation and payment of the costs.

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Judgment.

WALROND v. PARKER.

Nov. 18.

MR. SCHOMBERG moved for leave to substitute service of a *subpœna* to pay costs on the defendant's solicitor.

The bill was filed on the 6th of August, 1852. In the course of the suit he gave notice of motion on which the plaintiff appeared, but which the defendant subsequently abandoned.

On the 11th of November, 1857, the Court ordered that the defendant do pay to the plaintiff his costs of the defendant's abandoned motion.

The *subpœna* to pay costs served on the solicitor of a defendant permanently resident out of the jurisdiction.

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 ———
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 ———
Argument.

The costs were subsequently taxed at 31*l.* 7*s.* and a *subpoena* for payment of such costs issued.

Mr. St. Pierre B. Hook, the plaintiff's solicitor, made an affidavit of the above facts, and that the defendant had been now residing for several years in Australia.

The case of *Danford v. Cameron* (a), in which a similar order was made, was cited. See *Hunter v. ———* (b).

Judgment.
 ———

The VICE-CHANCELLOR made the order.

Nov. 24, 26.

COWDRY v. DAY.

When a solicitor takes a security from his client, the Court will not give effect to any stipulation if unusual and disadvantageous to the client, such as postponing the right to redeem or pay off the debt for twenty years.

THIS bill was filed by William George Cowdry, praying for the ordinary decree to redeem the mortgaged premises, or, in the alternative, that if the Court should be of opinion that the plaintiff was not entitled to immediate redemption of the mortgaged premises, then that the mortgaged securities might be reformed by striking out or duly modifying or qualifying the said restrictions against redemption in such a manner as to the Court would seem meet, or that the plaintiff might be admitted to redeem in such terms as to his Lordship should seem meet, the plaintiff hereby offering and undertaking to redeem the said mortgaged premises.

From the year 1839 to September, 1858, Joseph Addison Day acted as the plaintiff's steward, agent, and solicitor, and as such received the rents of the plaintiff's estates.

The plaintiff was possessed of an undivided moiety in

(a) 8 Hare, 329

(b) 6 Sim. 429.

an estate called Lower Hincknol Farm, let to a Mr. Hine at a yearly rent of 400*l.*, and of two other properties called North Cholningham let at 375*l.* per annum, and a small estate let at 30*l.* a year.

In the month of August, 1846, the plaintiff, being desirous to obtain a loan, on the 25th wrote to the defendant as follows: "I shall want the 500*l.* or 1000*l.* as a permanent loan for some years perhaps, and as soon as you can effect the mortgage the better."

In a letter dated the 3d of September the plaintiff wrote to the defendant thus: "I have been thinking of your suggestion about having the mortgage on Lower Hincknol, and I approve of it, as I see on one but ourselves and the mortgagee need know anything about it. My only reason for not wishing it to be on Hincknol was a kind of feeling I cannot express, but I give up all these ideas, as I want the cash; so now you know what to be at. Make the mortgage on Hincknol a permanent one for years, what time you would think most advantageous to me, not minding your other client, but I must say with such a security 4*l.* per cent. ample. Mind when you come up not to drop a word to Tom or any one about the mortgage, for I do not wish any one to know it but ourselves."

On the 18th of September the plaintiff gave the defendant the following authority:—

"I hereby order and authorise you to procure for me, on security of my share in my property called Hincknol, the sum of 500*l.* at the rate of 4½ per cent., payable half-yearly, for the term of ten years certain on punctual payment of the interest half-yearly. As witness my hand this 18th day of September, 1846.

"WILLIAM GEORGE COWDRY."

On the 20th of October the defendant advanced to the plaintiff 800*l.* on the security of a mortgage of the

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undivided moiety of the Lower Hincknol Farm, to secure that sum and future advances to the extent of 200*l.*; and it was thereby witnessed that in pursuance of the said agreement and in consideration of the sum of 800*l.* advanced to the plaintiff by the defendant, the plaintiff assigned the said moiety of Hincknol to the defendant, &c., for 2000 years from the date of the said indenture, without impeachment of waste, subject to a proviso for redemption by the plaintiff, his heirs, executors, administrators, or assigns, on payment of the sum of 800*l.*, on the 20th of October, which would be in the year 1856, and in the mean time interest at 4½ per cent.

It was by the same deed declared that in case default should be made in payment of the said sum of 800*l.* and such other sums, and the interest thereof, at the time and in the manner mentioned, and the defendant should give to the plaintiff, his heirs, executors, administrators, or assigns, twelve calendar months' notice in writing of his intention to proceed to a sale unless the principal and interest thereby secured should be paid at the expiration of the said notice, then it should be lawful for the defendant to sell, and absolutely dispose of the money which should arise from such sale, in the first place to pay and satisfy the costs and expenses of effecting the said sale or sales, to keep on foot any insurance, and all ther expenses incurred in the execution of the said trust; and in the next to retain the principal monies not exceeding 1000*l.* and interest, and to pay the surplus, if any, to the plaintiff. The deed contained a covenant in the usual form for payment of the principal monies and interest, and for insurance against loss by fire, with a proviso that the defendant should be entitled, in case default was made in payment of the principal and interest, to take and hold the rents, notwithstanding any demise by the plaintiff. Then followed a covenant that the monies should remain on the mortgage for 10 years, that the defendant would not sell or institute any proceedings

at law or in equity until the expiration of the period of ten years, or until two calendar months after default should be made during the said period of ten years in the payment of the principal or interest, or any part thereof, but that nothing in the said covenant contained should extend to affect any further purchaser or purchasers of the said premises, or any part thereof. And it was by the said indenture declared and agreed that the plaintiff should not pay or tender the said principal sum of 800*l.*, or institute any suit or proceedings in equity for redemption of the said premises until the expiration of ten years from the date thereof, without giving to the defendant twelve months' notice of his intention to do so.

On the 11th of September, 1847, the defendant advanced 200*l.* more, making in the whole 1000*l.*, and a memorandum thereof was indorsed on the said indenture.

On the 22d of September, 1848, the defendant advanced a further sum of 1100*l.* on the security of a mortgage of the same property to secure that sum and any further sum not exceeding 900*l.* The covenants were the same as those in the first deed, and declared that the mortgage was not to be called in by the defendant or repaid by the plaintiff, &c., until the expiration of ten years.

On the 7th of February, 1851, the defendant advanced a further sum of 300*l.* (making together 2600*l.*) on the security of the said property.

On the 15th of May, 1852, the defendant advanced a further sum of 200*l.*; on the 15th of May, 1853, a further sum of 200*l.*; and on the 31st of August, 1853, a further sum of 450*l.*, and on the 12th of December, 1854, a further sum of 250*l.* on the same property, secured by deeds containing similar covenants to those above mentioned, including, *inter alia*, a covenant that the mortgage-money should not be called in by the defendant, or tendered by the plaintiff, or proceedings taken until the expiration of ten years.

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On the 12th of May, 1855, the deed at present in question was executed, reciting the above securities, and that in consideration of a sum of 300*l.* further advanced by the defendant to the plaintiff, the plaintiff covenanted with the defendant, &c., that the premises should stand charged with the sum of 3700*l.* already advanced, as well as with the sum of 300*l.*, and that the premises should not be redeemable at law or equity until the sum of 4000*l.* should be fully paid, and interest, and that, in case the defendant should proceed to a sale of the said hereditaments, it should be lawful for the defendant, &c., out of the money to arise from such sale as aforesaid, to retain and pay, as well the sum of 300*l.* as of 3700*l.* The deed provided that the plaintiff would pay to the defendant the principal sum of 1000*l.* secured by the underleases of the 20th of October, 1846, on the 12th of May, 1875, and in the mean time interest at 4*l.* 10*s.* per cent., also the principal sum of 2700*l.* secured by the indentures above stated, and the 300*l.* then advanced and lent, making together 3000*l.*, on the 12th of May, 1875, with interest thereon at 5*l.* per cent. And the defendant for himself, &c., is thereby expressed to covenant with the said plaintiff, his heirs, &c., that the said principal sum of 4000*l.* should remain on the security of the said hereditaments for the term of twenty years from the date of the said now stating indenture, except in the events thereafter mentioned. And that the defendant, &c., would not proceed to a sale of the said hereditaments, or institute any proceedings at law or in equity by virtue of the said now stating indenture, until the expiration of the said term of twenty years, or until two calendar months after default should be made during the said period of twenty years in the payment of the interest half-yearly on the said principal sum of 4000*l.*, or any part thereof, but that nothing in the said now stating covenant contained should extend to affect any purchaser or purchasers of the said premises or any part thereof. And it was thereby

expressed to be declared and agreed that the plaintiff, &c., should not nor would pay or tender the said principal sum of 4000*l.* nor institute any suit or proceeding in equity for the redemption of the said premises until the expiration of the said period of twenty years from the date thereof, nor after the expiration thereof without giving the defendant, &c., twelve calendar months' notice of his or their intention so to do, or leaving the same at his or their last or usual place of residence in England, as by the said several indentures, now in the defendant's possession, when produced, will more fully and at large appear.

The plaintiff had entered into no evidence, but it appeared from the answer of the defendant that "the covenants not to pay off the loan for ten years were inserted at the plaintiff's particular request, and that though the defendant did not himself, yet that his clerk, Mr. Joseph King, did, before the plaintiff signed some of the indentures, read over the indentures to the plaintiff, after which the plaintiff read them over himself, and made remarks on the said covenants, saying that he wanted to see that the money advanced was made a permanent loan for ten years; that he wanted it for his life, but that as the defendant refused to lend it for that period, he wished to see that it would not be called in for ten years. That in answer to these remarks it was explained to the plaintiff that as the defendant could not call in the same mortgage debt, so he could not pay it off during that time, nor without giving the defendant forty-eight months' notice. That he, defendant, and his clerk did at the time when the said allowance was made and the deed executed explain to the plaintiff the nature and effect of the said deed executed in manner aforesaid, and in particular of the redemption clauses therein, and that he, defendant, or his clerk did tell the plaintiff and the plaintiff knew that the indenture contained these clauses."

The affidavit of Mr. King, the defendant's clerk, was to the same effect.

It was in evidence that in the indenture of the 12th of

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May, 1855, the term for which the loan was made was left in blank in the draft indenture, and that the plaintiff himself wrote thereon the words twenty years.

The defendant was the only solicitor who acted in the matter.

Argument.
 —

Mr. *Craig* and Mr. *Sandys* for the plaintiff.

A mortgagor cannot be restrained from redeeming the mortgage for an unreasonable period, such as twenty years: *Talbot v. Braddil* (a). But even if in ordinary cases such a restriction could in law be imposed by agreement, it was quite clear that as between solicitor and client such a stipulation on the part of the solicitor could not be supported. In such a case a solicitor must be prepared to show that the terms were such as he should have advised his client to make with a stranger, and that no diligence on his own part could have procured his client better terms: *Gibson v. Jeyes* (b), *Holman v. Loynes* (c). No such proof could be given. Where the estate was ample security (proved by the defendant's unwillingness to be redeemed) and the rate of interest high, it was clear that the effect of the bargain was injurious to the client, who could not sell his estate to advantage, *i. e.* the equity of redemption, raise further loan by mortgage of it, or substitute for the existing mortgage one carrying a lower rate of interest. If the client were forced to sell, the only purchaser would be the person who was his solicitor, and whom he could not venture to change.

The onus of proof was on the solicitor to show that the whole inconvenience of the arrangement had been pointed out to the client, which had not been attempted in this case.

Mr. *Green* and Mr. *Cracknall* for the defendant.

It was proved in this case that the period of redemption

(a) 1 Vern. 395, 183.

(c) 4 De G. M. & G. 270.

(b) 6 Ves. 266, 271.

was selected by the client himself for his own convenience, and assented to by the solicitor to accommodate his client.

It is not an unusual stipulation to postpone the period of redemption for a term of years (*a*), and though the period here is longer than ordinary, that circumstance cannot affect the principle on which these kinds of arrangements are sustained. [The VICE-CHANCELLOR :—It is not an unusual stipulation that the mortgagor is not to be compelled to pay off the mortgage before a specified time, but it is a different thing to restrict his right to redeem.] These covenants are reciprocal, and any other view would be unjust. In this very case the mortgagor had the use of the money at 5*l.* per cent. during a period when the defendant might have obtained twice the rate of interest, and in 1847-8 nearly the same amount on government securities as that paid by the plaintiff. Unless there was something unreasonable, which it had been shown there was not, it was quite clear this bill was demurrable : *Brown v. Cole* (*b*), *Stanhope v. Manners* (*c*).

(*a*) 5 Jarm. by Sweet, note 93, *at seq.*

(*b*) 14 Sim. 427.

(*c*) 2 Ed. 197, and Coote on Mortgage, 19, were also cited.

NOTE.—See *Newcomb v. Bonham*, 1 Vern. 7. The grantor conveyed his lands absolutely to Bonham, but by a deed of even date the lands were made redeemable on payment of 1000*l.* and interest at any time during the life of the grantee, and in case the lands should not be redeemed, he covenanted that the same should never be redeemed. On the grantor's death a bill to redeem was filed by his heir, and Lord Chancellor Nottingham decreed an account and redemption; but on demurrer to a bill of review to reverse

the decree the Lord Keeper (North) dismissed the bill, 2 Vent. 365, observing: "In a common mortgage such covenant to restrain redemption should not be regarded, but this was made with an intention of a settlement of his estate besides the consideration of the money paid, and he denied that he could have been by the decree of this Court limited to any time for payment of the money, for this Court cannot shorten the time that is given by express covenant and agreement of the parties, but when that time is past, then the practice is to foreclose." In Parliament held 1 & 2 Wm. & Mary this dismissal was affirmed.

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COWDRY
v.
DAY.
—
Argument.

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COWDRY

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DAY.

Judgment.

The VICE-CHANCELLOR :—

It is not an unusual stipulation between mortgagor and mortgagee that the money shall not be called in by the mortgagee for a certain number of years. But it is not usual to restrict by stipulation the right of the mortgagor to pay off the money for so long a period as twenty years.

In the present case, by the terms of the last security, there is a short clause at the end of the deed, not by way of covenant, but a declaration and agreement that the mortgagor, his executors or administrators (not his heirs or assigns), shall not pay or tender the money nor institute any suit or proceeding in equity for the redemption of the estate until the expiration of twenty years from the date of the mortgage, nor after the expiration of that period without twelve months previous notice.

This deed, which contains this extraordinary clause, was a deed of further charge for 300*l.* only of the whole mortgage debt of 4000*l.* It does not itself contain any period for redemption, but it recites the previous subsisting mortgages, which contain provisos for redemption.

It seems needless to consider what effect this clause would have on the then existing right to redeem the previous charges, because there are circumstances in the case which make it desirable to dispose of it on much higher grounds.

The clause in question is a contract between solicitor and client. If it has an effect in any material degree

“If a man makes a mortgage and covenants not to redeem, nay, if he goes so far as, in *Stisted's case*, to take an oath that he will not redeem, yet he may redeem.”—Argument of Mr. Vernon in *East India Company v. Atkins*, Comyns, 349.

See also *Kelvington v. Gardiner*, cited 1 Ver. 192; and *Spurgeon v. Collier*, 1 ed. Rep. 55. It is to be observed, however, that in *Spurgeon v. Collier* there was proof of fraudulent and oppressive conduct on the part of the mortgagee. See 1 Eden, p. 59.

prejudicial to the ordinary rights of a mortgagor, and is unusual in its terms, the solicitor must show that his client had sufficient advice and assistance to relieve him from the pressure arising from the relation of solicitor and client.

There is very little doubt as to the injurious effect of such a clause upon the interests of the client. It tends to keep him and his estate in the hands of the solicitor. It makes it difficult, if not impossible, for him to borrow any further sum on the security of the estate from any other person than the solicitor, or on any other terms than the solicitor prescribes. It tends to fetter the client in his right to change his solicitor. The stipulation is of a kind so hard upon the mortgagor as to be certainly unusual as between mortgagor and mortgagee.

It is against public policy and contrary to the law of this Court that any solicitor should be permitted to make any bargain or contract with his client for his own benefit and injurious to the interests of the client so long as the relation of solicitor and client subsists, unless enough is done to extricate the client from the pressure of the relation, and to secure to him other adequate advice and assistance.

There are no circumstances to relieve the defendant's case from the defect that his client had not sufficient advice or protection in the matter of this unusual and disadvantageous stipulation.

It seems to me, therefore, that the plaintiff is entitled to a decree for redemption. In an ordinary case the costs of a suit for redemption would fall on the plaintiff. So far as the costs have been increased by the defendant's resisting the right to redeem, there might be reason for ordering the costs to be paid by him. But considering that a great part of the costs of the suit has been occasioned by charges of an injurious kind made against the defendant by the original bill, which have been struck out in the amended bill, I think the plaintiff must have his decree to redeem

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on the usual terms of paying the principal money and interest, together with the costs of the suit.

I wish it to be understood that I express no opinion on the question whether if the mortgagee had not been the solicitor of the mortgagor, the Court would or would not have decreed a redemption where the mortgage deed contained a stipulation by the mortgagor such as appears in this case.



Dec. 20.

CATHERALL v. DAVIES.

In an interpleader suit the only question up to the hearing is, whether the defendants shall interplead; and, therefore, where one defendant only had gone into evidence on the question between the defendants, the Court directed an inquiry.

BY an indenture dated the 12th of June, 1859, Richard Garnons demised to Henry Jones certain premises called the Black Lion, in the town of Mold, in Flintshire, for three lives and the survivor, at the yearly rent of 35*l.*, with power of distress and re-entry.

Under an indenture dated the 2d of June, 1828, the residue of the term became vested in the plaintiff, who duly paid his rent to Richard Garnons during his life. Richard Garnons by his will dated 7th of June, 1839, devised all his real estates to Dorothea Garnons for life, remainder to the use of Catherine Jones Garnons. Dorothea Garnons died in 1853, and Catherine Jones Garnons died in 1845, having made a will disposing of her real and personal estate. After her decease, C. Roberts, R. Davis, and Ann his wife, and D. Evans claimed to be entitled to the said property as heirs-at-law of Catherine Jones Garnons. The defendant Tullock claimed to be entitled to the said property under a devise by the testator "of his estate in that particular place."

The plaintiff being sued at law by those claiming as heirs and threatened with proceedings by Tullock, as devisee, filed this bill, praying that the defendants might interplead.

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Statement.

The devisee Tullock, had gone into evidence generally to prove that the testator was accustomed to call the Black Lion by the description contained in the will.

The persons claiming as heirs had not gone into evidence.

Mr. *Bacon* and Mr. *Eddis* appeared for the plaintiff.

Argument.

Mr. *Malins* and Mr. *Hawkins* now asked for the opinion of the Court. The only question was one of construction, and was ripe for decision.

Mr. *C. Simpson*, for the heirs-at-law, claimed to have an inquiry directed at chambers. The heirs-at-law had had no opportunity of cross-examining the witnesses of his co-defendants, or of seeing their answer in an interpleader suit; the only question, up to the hearing, was whether the defendants should interplead: *Angell v. Hadden* (a) were cited.

The VICE-CHANCELLOR :—

Judgment.

Under ordinary circumstances the decree made at the hearing in an interpleader suit, is that the defendants do implead. There must, however, be an inquiry whether the land passed by the particular description; and if it did, who was the testator's heir-at-law. Tax the plaintiff's costs up to this time, and stay proceedings as to him, and give the devisee the conduct of the inquiries.

(a) 16 Ves. 202.

1859.

Nov. 5.

GLYN *v.* HOOD.

Equitable assignment of a balance of 25,000*l.* as the share due to the assignor from his late partners, and stated to consist of 5000*l.* in the hands of C. & Co., followed by a direction of the partners to C. & Co. to pay the 5000*l.* to the assignee, and their own undertaking to pay the further balance, describing the share as the 5000*l.* and "further balance, say together 24,000, or thereabouts." —*Held*, that the loss of the 5000*l.* occasioned by the failure of C. & Co., within two months after the date of the instructions, must fall on the partners and not on the assignee, there being no privity of obligation or right of action on the part of the assignee against C. & Co., who were agents of the partners, and no laches.

SIR GEORGE LARPENT, prior to the 1st of December, 1846, carried on the business of merchants and commission agents at Canton, with William Bell, A. Wilkinson, and J. M. Smith, under the style of Messieurs Bell & Company. On the 1st of December, 1846, the partnership was dissolved, and Sir George Larpent retired from the firm, when a new partnership was formed by the continuing partners, and carried on under the style of Bell & Co., until the death of Mr. Bell on the 1st of February, 1849.

In July, 1847, Sir George Larpent entered into a negotiation with Messrs. Glyn & Co. for a loan of 20,000*l.*, and that firm agreed to make the required loan on the security of Sir George Larpent's share in the capital, stock, and effects of the late firm of Bell & Company. On the 10th of July, Sir George Larpent wrote to Messrs. Glyn & Company as follows:—

"London, Austin Friars, 10th July, 1847.

"Dear Sirs,—My partnership with Messrs. Bell & Co., of Canton, having terminated on the 31st of December last, I am entitled by its conditions to receive payment of my capital stock on the 31st of May next. The amount thereof, clear of all claims, may be taken roughly at 25,000*l.*, and I am informed by Mr. William Bell that a portion of the balance at credit with Messrs. Cockerell, Larpent, & Co., on account of Bell & Co. (say about 4000*l.* or 5000*l.*), will be appropriated towards the payment of the same. In pursuance of the arrangements between me and your firm, I hereby authorize Mr. William Bell, acting for Bell & Co. in this country, to pay you the

amount of my said capital stock, say 25,000*l.*, or thereabouts, and your acknowledgment thereof will be a sufficient discharge, and I hereby bind myself to enter into such further covenant and engagements as you may require in order to give you a full and perfect lien thereon, such as you may think necessary to secure to you an exclusive title to the said balance, the same being in consideration of and as collateral security for your advances now due, or which may be hereafter due, by the house of Cockerell, Larpent, & Co. to your firm.

(Signed) "GEO. LARPENT.

"Messrs. Glyn, Halifax, & Co..

"Lombard Street."

On the same day, 10th of July, Messrs. Glyn & Co. wrote to Mr. Bell as follows :—

"Lombard Street, 10th of July, 1847.

"Sir,—On the other side we beg to hand you a copy of a letter addressed to us this day by Sir George Larpent, authorizing you to pay to us 5000*l.* at present in the hands of Messrs. Cockerell & Co., part of the surplus partnership assets of his late firm, Messrs. Bell & Co., Canton, together with the balance of his capital of 20,000*l.* or thereabouts. And we shall be obliged by your acknowledging the receipt of this letter, and intimating to us in conformity hereto that the 5000*l.* above alluded to will be paid to us, and also that your present firm will, in due course, make payment to us of the balance remaining due to Sir George Larpent on account of his capital, say 20,000*l.* or thereabouts.

"We are, Sir,

"Your very obedient servants,

"GLYN, HALIFAX, MILLS, & Co.

"To Wm. Bell, Esq."

A copy of the above letter was sent by Sir George

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Larpent, together with Sir George Larpent's letter of the 10th of July to Messrs. Glyn & Co., to Mr. William Bell, enclosed in the following letter:—

“London, Austin Friars, 12th of July, 1847.

“Dear Sir,—I have made arrangements with my friends Messrs. Glyn & Co. for an advance of 20,000*l.* on the balance forthcoming to me on the 31st of May, 1848; in order to carry the same into effect in a business-like manner I have written to Messrs. Glyn & Co. the letter of which I hand you a copy, and I enclose also their letter to you, and the draft of a letter which they and I request you will be so good as to sign and return through me. The object you will easily see. It is to give Messrs. Glyn & Co. a complete lien on my said balance, and to guard against any disturbance of the arrangements by my death. Your early attention to the business of this letter will oblige.

“GEORGE LARPENT.

“To William Bell, Esq., .

“Plough Hotel, Cheltenham.”

Mr. Bell's reply was as follows:—

“Cheltenham, July 14th, 1847.

“Gentlemen,—I beg to acknowledge the receipt of your letter of the 10th inst., covering (a) copy of a letter of same date from Sir G. Larpent to yourselves, authorizing me to make payment to you of 5000*l.* on account of his capital with Bell & Co., Canton, and also to make further payment to you of the remaining balance of capital in that firm, say together 24,000*l.* or thereabouts.

“In compliance with your request, and with Sir G. Larpent's letter above alluded to, I beg to acquaint you that I have instructed Messrs. Cockerell & Co. to transfer to yourselves from the surplus partnership assets of Bell & Co. in their hands, the sum of 5000*l.*, on the receipt of which you will please grant me an acknowledgment; and

(a) So in the original.

on behalf of myself and partners in the present Canton house, I engage to pay you in due course the remaining balance of Sir G. Larpent's capital with them, say 20,000*l.* or thereabouts.

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"WM. BELL.

"Messrs. Glyn, Halifax, Mills, & Co."

This arrangement was immediately communicated to the Canton partners and agreed to by them, and their assent communicated to Mr. Bell in the course of the year 1847.

On the 19th of July, 1847, Mr. George Larpent wrote to Messrs. Glyn as follows :—

"London, 19th of July, 1847.

"Dear Sirs,—Enclosed, I hand you my promissory note for 20,000*l.* payable on the 31st of May next, to the order of Messrs. Cockerell, Larpent, & Co., and indorsed by them as collateral security, for the due payment of which I enclose two letters from Mr. William Bell, of the firm of Bell & Co., of Canton, and shall be obliged by your discounting them as verbally agreed, and placing the proceeds to the account of Messrs. Cockerell, Larpent, & Co.

"GEORGE LARPENT.

"Messrs. Glyn, Halifax, & Co.,

"Lombard Street."

On receipt of the above letter, Messrs. Glyn & Co. placed 20,000*l.* to the credit of Cockerell & Co., in which firm Sir George Larpent was a partner.

On the 18th of August 1847, Messrs. Glyn & Co wrote to Mr. William Bell as follows :—

"London, 18th of August, 1847.

"Sir,—We beg to acknowledge the receipt of yours of the 14th of July last, informing us that you had instructed Messrs. Cockerell & Co. to transfer to us 5000*l.*

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from the surplus partnership assets of Messrs. Bell & Co., in their hands, also engaging, on behalf of yourself and partners in the Canton House, to pay to us in due course the remaining capital balance of Sir George Larpent's capital with them.

"We are, &c.,

"GLYN, HALIFAX, MILLS, & Co."

It was proved in evidence, that at the date of this transaction, Messrs. Cockerell, Larpent, & Co. had no sum of 5000*l.* in their hands applicable to the payment of the plaintiff's claim, and the plaintiffs applying for payment, they were so informed. Certain sums, however, belonging to Bell & Co. were in course of payment. On the 25th of October, and the 28th of December, 1847, Mr. William Bell, on behalf of his firm remitted bills to the plaintiffs to the amount of 9000*l.*, which were duly paid.

Messrs. Cockerell & Co. in September, 1847, stopped payment.

Sir George Larpent's promissory note for 20,000*l.* became due on the 31st of May, 1848, but was dishonoured, whereupon, Messrs. Glyn & Co. wrote to Mr. William Bell as follows:—

"Lombard Street, 31st of May, 1848.

"Sir,—We beg to inform you that Sir George Larpent's promissory note, due this day for 20,000*l.*, has been duly presented by us for payment, and returned dishonoured. Requesting to hear from you respecting the payment of the balance due on this note,

"We remain, &c.,

"GLYN, HALIFAX, MILLS, & Co."

To this letter Mr. William Bell replied as follows:—

"Gentlemen,—In reply to your note of yesterday, I beg to say that I am not possessed of any funds belonging

to Sir George Larpent, from the late firm of Bell & Co., Canton, in which he was a partner, the accounts not being yet wound up, and that a few months probably will elapse before they can be finally balanced. When such is the case, you will be duly informed through Sir George Larpent.

"Meanwhile, it is right I should inform you that I am advised to make no further payments on account of Sir George Larpent's capital, until I have received from you an acknowledgment for 5000*l.* directed to be paid to you by Cockerell, Larpent & Co., on account of that capital on the 14th of July last; of which payment you were advised by me in a letter under same date. For further communication on the point, I refer you to my solicitors, Messrs. Crowder & Maynard.

"I remain, Gentlemen,

"Your obedient servant,

"WM. BELL."

William Bell died on the 1st of January, 1849, having by will appointed the defendants, J. Hood, and G. T. Kemp, his executors, who proved his will and codicils, and possessed themselves of his assets to a large amount.

Messrs. Wilkinson & Smith, his surviving partners, continued for some time to carry on the business. On the 3d of August, 1854, Messrs. Bell & Co. paid Messrs. Glyn, Halifax, & Co., 3217*l.* 4*s.* 9*d.*, and, on the 24th of July, 1852, they paid 1000*l.* on account of Sir. G. Larpent's estate, but refused to make further payments. In March, 1855, Sir G. Larpent died, insolvent, and at present there is no legal personal representative of his estate.

The defendants furnished an account to Messrs. Glyn & Co., in which they claimed to be allowed the sum of 5000*l.* directed to be paid by Messrs. Cockerell & Co., but not received by Messrs. Glyn & Co. After deducting the sum of 5000*l.* they admitted that there remained in their hands

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the sum of 321*l.* the residue of Sir G. Larpent's share.

Messrs. Glyn & Co. thereupon filed this bill, asking for a declaration that the letters of the 10th and 14th of July, 1847, were an effectual charge by way of equitable assignment, or Sir G. Larpent's share; and for the necessary accounts.

This case was heard on appeal by the Lords Justices on the 19th of December, and on the 18th of January, 1860, the appeal was dismissed with costs.

Argument.
 —

Mr. *Bacon*, Mr. *Giffard*, and Mr. *E. R. Turner*, for the plaintiffs.

It could not be disputed that the plaintiffs were equitable assignees of Sir G. Larpent's share in the assets of Bell & Co. Then, why were they to be prevented from having the full benefit of the assignment? Because it was contended they had received an order on Cockerell & Co. for 5000*l.*, and had not obtained payment. If, indeed, they had failed to apply for payment, and by their laches the fund had been lost by Messrs. Cockerell's failure, there might be some ground for the argument; but, *laches* in this kind of transaction depended on the fact, whether the holder of the instrument might have been paid, had he applied. Here the plaintiffs did apply, and Messrs. Cockerell never had the means of satisfying their demand. It was submitted, therefore, that the plaintiffs were entitled to a decree.

Mr. *Malins*, and Mr *Wigram*, for the defendants.

In this case, it could not be denied that Bell acquiesced in the assignment on the terms that the plaintiffs should receive the 5000*l.* through Cockerell's firm.

It was clear that the intention was, that the 5000*l.* should be paid forthwith; but if so, it was the duty of the assignee immediately on non-payment to have given notice to Bell. That no such notice was given, was admitted, but

it was contended that notice was unnecessary, as the fact was known to Bell; but knowledge was not notice.

It was clear that the drawer of a bill was entitled to be discharged for want of notice of dishonour by the payee: *Orr v. Maginnis* (a), *Legge v. Thorpe* (b), *Whitfield v. Savage* (c), *Brown v. Maffey* (d), *Rucker v. Hiller*, (e), and *Claridge v. Dalton* (f), were cited.

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HOOD.
Judgment.

The VICE-CHANCELLOR:—

The plaintiffs are equitable assignees of the whole share of Sir G. Larpent in the assets of Bell & Co. The amount of that share was estimated at 25,000*l.*, or at least 24,000*l.* Upon the general right of the plaintiffs as equitable assignees of the whole share, on the construction of the letters there is no doubt.

The question is, whether as to the 5000*l.*, which at the time of the assignment was stated to be in the hands of Cockerell & Co., the loss is to fall on the plaintiffs. Bell's letter of the 14th of July, 1847, is an undertaking to pay the whole amount of the share, and states that he had instructed Cockerell & Co. to pay 5000*l.* to the plaintiffs out of surplus assets of Cockerell & Co. in their hands, and undertakes to pay the surplus of the balance in due course. The words are:—"And also to make further payment to you of the remaining balance of capital in that firm, say together 24,000*l.*, or thereabouts." There is nothing in the language of any of the documents to justify

NOTE.—The general rule of purpose, notice must be given or law is thus stated, Chitty on Bills, forwarded (in the manner and 10th ed. p. 302. "In case a bill, within the time prescribed by cheque or note, be not paid upon law) to the drawer and indorsers being duly presented for that of the bill or cheque. Otherwise,

(a) 7 East, 361.

(b) 12 East, 174.

(c) 2 Bos. & Pull. 277, 280.

(d) 15 East, 220.

(e) 16 East, 44.

(f) 4 M. & S. 226, 229.

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the argument that two separate things were assigned—the 5000*l.* and the remainder of the share—the 5000*l.* said to be in the hands of Cockerell & Co. was only dealt with as a proposed mode of payment, and as a sum which would when paid be acknowledged and taken as *pro tanto* in satisfaction of the share. Bell gave the direction to Cockerell to pay the 5000*l.* in a form which imposed no active duty on the plaintiffs. It was only a mode by which payment of part of the share was directed to be made. The instruction to an agent to make a payment, creates no obligation or contract between the agent and the person to whom the payment is to be made. In the present case there is no more than the instruction to the agent and the statement to the plaintiff that such an instruction had been given.

As to any laches on the part of the plaintiffs, the circumstances of the case exclude the doctrine of laches, inasmuch as there was no right in the plaintiffs to compel the agent to obey the instructions of Bell, and no duty on the part of the plaintiffs in regard to the agency.

Besides all this, there has been an insurmountable difficulty in the defendants' case by their being obliged to admit that there was not a sum of 5000*l.* in the hands of Cockerell & Co. at the date of the order.

Declare that the plaintiffs are entitled to recover against the defendants the whole share of Larpent, without deducting the 5000*l.* or any other sum in respect of monies alleged to have been in the hands of Cockerell & Co. The amount of 321*l.* being admitted to be due on the footing of that declaration, decree payment of that sum with interest from July, 1847.

the parties entitled to notice, and who have not received it will be discharged from liability, not only on the instrument itself, but also in respect of the debt or transaction in respect of which they became parties to it."

FRAZER v. THOMPSON.

1860.
Jan. 12.

THIS was a motion to refer it back to Mr. Bloxam, the Taxing Master, to review his taxation of the costs of the defendant Thomas Postlethwaite Gardner, directed by the decree in the cause, dated the 28th of May, 1859, and the order of the Lord Chancellor and Lords Justices, on appeal, dated the 30th of July, 1859.

The bill was filed by the assignees in bankruptcy, of one Thomas Gardner, to set aside a settlement executed on his marriage, in favour of his wife and his son, by a former marriage, who was an infant, and interested under the settlement.

By an order of the Court, dated the 28th of April, 1858, obtained by the plaintiffs, Mr. John James Johnson, the solicitor to the suitors' fund, was appointed guardian, *ad litem* of the defendant Thomas P. Gardner and another.

On the 10th, 11th, 12th, and 14th of March, 1859, the cause was heard, and on the 28th of May, 1859, the plaintiffs' bill was dismissed.

On the 23rd and 30th of July, 1859, the Lord Chancellor and the Lords Justices being of opinion that Gardner had, anterior to the settlement, committed an act of bankruptcy, reversed his Honour's decree, and decreed in the plaintiff's favour, and ordered that the plaintiffs should pay to the infant, T. Postlethwaite Gardner, defending the suit, by John James Johnson, the solicitor to the suitors' fee fund, as the guardian, his costs to be taxed by the proper taxing-master, and that the plaintiff should be at liberty to add what they should so pay to

Where the Court, at the instance of the plaintiffs, orders the solicitor to the suitors' fund to appear for an infant defendant, his appearing for other defendants suing *in forma pauperis*, will not disentitle him to the full costs of suit. *Re Colquhoun* (a) decided on the principle of *retainer*.

(a) 5 De G. M. & G. 35.

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their own costs of this suit ; and their Lordships made no other order as to costs.

It appeared that on the 1st of May, 1858, the bankrupt Gardner, and his wife, obtained an order to sue *in forma pauperis*, and Mr. Johnson, according to the usual practice of late years, acted as their solicitor.

It appeared from copies of proceedings in such a suit, Mr. Johnson had only charged per folio, stationer's charge, for writing. The bill was taxed at 97*l.* 12*s.* 11*d.*, less 1*l.* 2*s.* 6*d.*, but it was objected that if Mr. Johnson appeared for Gardner and wife, as well as for the infant, that the bill should be apportioned, and that as Mrs. Gardner appeared separate from her husband, that only one third of the said bill should be allowed for the infant.

The following objection was delivered as to two-thirds of the general costs.

"Mr. Johnson (a member of the firm of Field & Co.), who appears for the infant defendant, and whose bill is the subject to taxation, appears for the defendants Joseph Gardner and Mary Ann his wife. Mr. Johnson or his firm can have but one bill of costs for all the defendants for whom he or they appear, consequently this item must be apportioned, and as Mary Ann Gardner was made defendant in respect of an interest separate from that of her husband, one-third only of this item ought to be allowed in this bill."

Argument.

Mr. Bacon and Mr. Kekewich, for the assignees, contended that the practice was now well settled, that where one solicitor appeared for several defendants he could only recover from each an apportioned share of the costs. Here the solicitor had appeared for the husband, and for his wife in a separate character, and for the infant, and could only claim, therefore, one-third. This might be a hard case, but so was that which settled the practice: *Re Colquhoun* (a).

(a) 5 De G. M. & G. 35 ; s. c. 1 Sm. & G. App. 1.

Mr. *Taylor* appeared for Mr. Johnson, but was not called on.

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FRAZER
v.
THOMPSON.
Judgment.

The VICE-CHANCELLOR:—

The case of *Colquhoun* was decided on the question of retainer, but here no such question arises. The solicitor for the suitors' fund was not retained at all for this infant, but at the plaintiff's request was ordered to appear for him. This, therefore, is an unfounded application, and the motion must be refused with costs.

NOTE.—In *Harris v. Hamlyn*, directed the plaintiff to pay Mr. 3 De G. & Sm. 470, in which the Johnson's costs and to add them fund was deficient, the Court to his security.

CONYBEARE v. THE NEW BRUNSWICK AND CANADA RAILWAY COMPANY (LIMITED).

Dec. 12, 13,
14, 1860.
Jan. 14,
1860.

THE bill was filed by the plaintiff, a shareholder and director of the company, against the company and the directors, and prayed the following relief—

First, that the contract for the purchase of 200*l.* A shares in the company might be rescinded, and the purchase-money, paid by the plaintiff, repaid by the directors with interest at 6*l.* per cent. on his delivering up to the defendants, the directors, the certificates of the shares. Or, in case the company is not entitled to retain for its own benefit the purchase-money obtained for it by its directors under a contract grounded on their misrepresentations, then that the company might be directed to repay the purchase-money, &c.

Bill by a shareholder and director in a limited company, alleging that he had been induced by misrepresentation to take shares, but it appearing that though the reports published by the directors contained erroneous but not fraudulent statements, the truth of which the plaintiff had the means of ascertaining,

the bill was dismissed; but the accounts not having been kept as required by the Act, the dismissal was without costs.

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Secondly, that an account might be directed, &c., of what was due to the plaintiff.

Thirdly, that interest might be paid by the directors on what should be found due, or, if the company should be liable, then it should be paid out of the next calls.

Fourthly, that the company might be restrained from incurring further outlay in carrying their line beyond the Howard settlement, and from paying further interest to the shareholders on the paid-up capital, until what should be found due to the plaintiff for principal and interest should have been paid to him, &c.

Fifthly, that the company might be directed to remove plaintiff's name from the list of shareholders, &c.

The bill stated that the company was a limited company registered under the Joint Stock Companies Act, 1856 (19 & 20 Vic. c. 47).

That in consequence of a report addressed to a general meeting held on the 29th of July, 1858, and of the satisfactory statements made at the meeting, the plaintiff made inquiries of his broker, and in August or September, 1858, himself, made further inquiries in respect of the company. In reply to such inquiries the secretary represented that the A shares were preference shares, entitled to a preferential dividend of 6*l.* per cent., and that to each A railway share was appropriated a corresponding A land share, entitling its possessor to four acres of land. The secretary further explained that such preferential dividend was further secured to the holders of the railway shares for twenty-five years from August, 1860, by the guarantee of the provincial government of New Brunswick, in case the said railway should be opened to Woodstock by that date; and that the company had made provision for the payment of the 6*l.* per cent. on the paid-up share capital to the A shareholders during construction, and that 20,000 acres of land had been actually and expressly appropriated for the purpose of furnishing funds for such payments.

That the plaintiff further inquired of the secretary to what point the company had already carried their railway, and whether the time remaining would suffice to complete the undertaking, and whether they would have sufficient funds to carry it through, and so to secure the colonial guarantee. In reply to such inquiries, the secretary pointed out the course of the railway on a map, and informed the plaintiff that a section of the railway, forty miles in length, had been open nearly a year before to Barber Dam. Of this section, the bill alleged twenty-five miles had been already constructed by the St. Andrews and Quebec Railroad Company, and fifteen miles had been made by the new company. The secretary also stated that twenty-five miles more from Barber Dam to the Howard settlement were on the point of completion, and would be opened in October, 1858, and that notices of such opening had already been given, so that only about twenty-five miles of railway from the Howard settlement to Woodstock would then remain in order to complete the undertaking. That he also explained that there would be ample time to complete this section, the company's engineers having made three rough surveys of the new section, and that the line could be built, rail included, for 2500*l.* a mile and that the company would have sufficient funds, not only to carry through their undertaking and so secure the colonial guarantee, but also to pay the stipulated interest, during construction, to the shareholders on their paid-up capital. He also spoke of the calls being made at short intervals, to meet the costs of the extension, and informed the plaintiff that 50,000*l.* or 60,000*l.* would suffice for works remaining to be done, and mentioned that it had been suggested that the works might be carried on with greater vigour and economy by raising such sum on mortgage of the future calls." In confirmation of such statements, the secretary placed in the plaintiff's hand a report, stating they had no doubt of being able to finish within the capital and time assigned for its

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construction. In the last half-yearly report, it was stated that forty miles of the line to Barber Dam had been opened, and since that period the further construction of the railway had progressed satisfactorily; "that the rails, chairs, and other materials for the construction of twenty-five miles of the road from Barber Dam have been forwarded, and a further opening will take place this autumn to the Howard settlement. The manager has been instructed to advertize for tenders for the grading of the last section of the road. . . . With respect to the property of the land shareholders, the directors have great satisfaction in reporting that not only has the deed of grant of 20,000 acres of land referred to in the last report been received, but that the New Brunswick Government has given to the company a further grant of 30,000 acres, which is now under survey. . . . The directors have instructed the manager to be prepared to grant lumbering licences during the ensuing winter, and he is now in communication with parties in America, who propose to take certain quantities of timber from your lands each year, for a period of five years."

"That the plaintiff still doubting whether the railway could be constructed in so short a space of time, the secretary put into his hands a report dated the 31st of December, 1857, which was as follows:—

"That the statements previously made as to cheapness of construction have been fully borne out by an investigation of the total cost of the forty miles now open.

"The works are now being vigorously proceeded with up to the sixtieth mile, and the board have recently authorized the grading of five miles more, so that at the present time there are twenty-five miles under contract." The cost of this portion was estimated at 2617*l.* 10*s.* a mile; and that of the remainder of the line to Woodstock at 2300*l.* a mile. The report added: "The disparity which exists between the small cost of this line and the

larger cost of similar undertakings has led many parties to believe that liabilities are accumulating, which at some future time will be brought against the company. To remove any apprehensions of this kind your directors think it right to state that the system of payment adopted in the province involves the liquidation of every claim once in six weeks, so that when the certificates of the engineer and the accounts forwarded by the manager are settled, the capital account is virtually closed up to that time, and in this way arrears of every kind are most effectually prevented." "Your directors state that they were in expectation of receiving from the Government of New Brunswick a grant of land, and that it was their intention to make arrangements for disposing of the timber during the next session. They have now the satisfaction to report that those expectations have been fully realized, and that the New Brunswick Government have shown their perfect satisfaction with the progress of the works by transmitting 18,000*l.* on account of their stock in the undertaking, and by granting to the company 20,000 acres of land, which is now being surveyed, accompanied by an assurance that a further grant will be made so soon as it is required by the company for the purpose of settlement. Your directors have reason to believe that a revenue will speedily be obtained from the sale of the least valuable portion of the timber on the company's land, the manager, in a recent communication, having stated that he could realize a profit of about 13,000*l.* from the sale of 60,000 cords of firewood, and that certain parties from the United States had offered to contract for a million of sleepers to be sent to Cuba, from which he can secure a further profit of from 13,000*l.* to 14,000*l.* Arrangements are also in progress for disposing of the company's land. It will be divided into plots of from 50 to 100 acres each, and for a certain amount to be agreed upon, settlers will be conveyed from England direct to their own farms," &c. The report

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also stated that "The receipts on the forty miles now open, although the traffic is very partially developed, cover the working expenses and leave a profit."

The bill also alleged that the secretary showed the plaintiff the grant of land, which was in terms absolute, and gave him the two reports, and a set of the Acts relating to the company, but which did not include the 19 Vic. c. 69, which contained a clause enacting that if the said railway should not be completed to Woodstock in the course of 1860, all tracts of land made to either of the companies, should be annulled as if no such grant had been made. The plaintiff took home with him the said set of the Acts. On a subsequent day, as the bill alleged, the secretary told him there were about 200 A shares held by defaulters, which the company were prepared to forfeit; and relying on the statement in the report of December, 1857, that the claims were liquidated every six weeks, he agreed to take 200 A shares at the market price of the day, viz., 10*l.* 5*s.*, and to pay all future calls by anticipation, receiving 6*l.* per cent. on calls paid in advance. That he stipulated to be a director, and stated the money was invested in 3*l.* per Cent. Reduced, and would not be available till the end of October. The plaintiff's offer was accepted by the directors, and on the 9th of September, 1858, he paid 563*l.* 15*s.* for 55 A shares with their corresponding land shares, which were all the secretary had then to deliver, In the end of September, on the plaintiff's calling, the secretary told him that the company's manager in New Brunswick had been pushing on operations faster than he had been authorized to do, and that there would be 30,000*l.* to be paid at an earlier date than he had led the plaintiff to believe, and before sufficient money to meet the amount could be produced by calls, but the secretary stated this would make no ultimate difference.

In the second week in November, the plaintiff paid 1600*l.*, being the full amount of all future calls on 200

A shares, and shortly afterwards received notice he had been appointed director, and might take his seat at the following board meeting, on Thursday, November 25th. That the plaintiff accordingly took his seat that day, and as the bill alleged, was surprised to find that an action was pending against the broker of a director who had never paid one call on 200 shares; that the company was indebted to their bankers, in 30,000*l.*, and that bills from 10,000*l.* to 20,000*l.* had been drawn, and would have to be met. That on the 9th of December, the plaintiff finding that the total amount to be obtained by calls had been expended, and that nearly 150,000*l.* would be required, proposed a subsidiary land company, or that money should be raised by mortgaging the lands already granted; when he was told that the company had no power to make an immediate sale or mortgage of such lands. On the 16th of December, 1858, the plaintiff communicated to the directors certain proposals asking to have the contract as to 145 shares rescinded, and the purchase-money returned.

The bill alleged that either at the board meeting held on the 30th of December, 1858, or on the 6th of January, 1859, which were the only two meetings at which the plaintiff had been present since he had an opportunity of re-perusing the said set of Acts, he told the Board he had satisfied himself that the divesting clauses affected the old St. Andrews and Quebec Company, and did not interfere with the new company's right to make immediate sale of their lands. The solicitor of the company then pointed out the second section of the Act, and stated it was introduced by the Provincial Legislature.

That section was as follows:—

“ If the part of the contemplated St. Andrews and Quebec railroad which may be between St. Andrews and Woodstock, and also a branch thereof to the river St. Croix, at or near the ledge so called, in the parish of

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St. Stephen, in the county of Charlotte, be not completed, and in full operation, within the space of four years from the time when this Act comes into operation, all and every the grants of land, and the rights and privileges conferred by the several facilitating Acts, relating to the company, shall be utterly null and void, and the land and privileges shall revert and revest in her Majesty, as if no grant had been made or rights or privileges conferred."

The bill then charged that the A shares were only entitled to a preferential dividend, if the line were carried into Woodstock.

That the statement in the directors' report of December, 1857, that the traffic on the forty miles open, not only paid the working expenses, but also left a profit, was false, and that there had been a loss since the opening of the line to Barber Dam, &c.

It appeared from the evidence that a case was laid before Mr. Bullar, and his opinion taken.

"Mr. Bullar is requested to peruse the accompanying Acts of the New Brunswick Legislature, and also the accompanying grant of land made in pursuance of the provisions of 12 & 13 Vic. c. 27, that whenever the company shall have laid out 10,000*l.*, currency, the local government should have the power to grant 10,000 acres of land, and with special reference to the clauses of forfeiture, in the event of the railway not being completed up to Woodstock.

"To advise:—

"Whether the lands contained in this conveyance, and granted pursuant to the above provisions above alluded to, are free from the forfeiture clause, or still subject to be forfeited on the non-completion of the line to Woodstock, within the period assigned."

Mr. Bullar advised as follows:—

"I am of opinion that under the Facility Act of

19 Vic. c. 69, s. 2, and notwithstanding section 7 of that Act, and the Act of 10 Vic. c. 70, the land in question is liable to forfeiture, if the line to Woodstock, and the branch to the river Saint Croix, be not completed and in full operation by August 21st, 1860.

"JOHN BULLAR."

"Temple, May 7th, 1858."

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There was some conflict in the evidence as to what the secretary had stated, but it was admitted the first copy of the Acts did not contain the 19 Vic. c. 69. It was admitted, also, that in the articles of association the divesting clause of 19 Vic. c. 69, was correctly set forth.

The defendants contended that by virtue of the 20 & 21 Vic. s. 4, they had power to make immediate sale of 20,000 acres.

That the plaintiff, before the purchase of the 2007 shares, was told of the liabilities incurred by the colonial manager.

Mr. Bacon and Mr. L. Russell appeared for the plaintiff, and relied on the case of *Rawlins v. Wickham*,^(a) and as to the question that accounts not having been kept, as provided by the Act, cited *Sharp v. Taylor*^(b); *Reynell v. Sprye*^(c).

Argument.

NOTE.—20 & 21 Vic., s. 4 enacts as follows :—Nothing in this Act contained shall, in any manner, affect the lands, rights, and privileges secured to the class A shareholders of the Saint Andrews and Quebec Railway Company under the said agreement of the 20th of September, 1856, and under the articles of

association of the company in return for such transfer as aforesaid, and the lands liable to be sold by the company to realize the interest which shall be paid to classes A and B of their shareholders during construction shall be limited not to exceed 20,000 acres.

(a) *Post*, 355.

(b) 2 Phil. 801.

(c) 1 De G. M. & G. 660.

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Mr. *Malins* and Mr. *Baggallay*, for the defendants, the directors, contended that there was no misrepresentation and that the company would realize all the hopes entertained of it, unless affected by the plaintiff's conduct.

Mr. *Locock Webb* appeared for the secretary.

The VICE-CHANCELLOR :—

This is a suit to rescind a purchase made by the plaintiff of certain shares in a joint-stock company, on the ground that the plaintiff was induced to make the purchase by misrepresentation.

To establish a case of this kind, it is generally necessary that there be clear evidence that something was positively, and erroneously, stated, or unfairly concealed, of such a nature as materially to influence the mind of a purchaser, who was using proper caution and diligence in the transaction. Where the subject-matter of the purchase is a certain number of shares in a public joint-stock company, the affairs of which are conducted under the regulations of an Act of Parliament, requiring a periodical and accessible record of its transactions and its assets, there may be some modification of the rule applicable to the purchase of ordinary property. Parliament has imposed terms on these joint-stock companies, compelling them to supply an accessible record with a view to the safety of creditors and purchasers. These sources of information would be provided in vain by the Legislature, unless a resort to them was considered a part of the duty of a purchaser.

If it be held that the doctrine of constructive notice is not applicable to the case of negotiation for a private contract of partnership, as in the case of *Rawlins v. Wickham*, where there are no legislative regulations for

the supply of information, it is a very different thing to apply that principle to the case of a public joint-stock company.

Nevertheless, fraudulent misrepresentation or fraudulent concealment as to the state of its affairs, especially, if made so as to disarm inquiry, must have their due effect in avoiding purchases of shares in public companies, subject to these legislative safeguards, if the fraudulent conduct be clearly proved.

In the present case, there is a great want of precision in the allegations of the plaintiff's bill. But there are two particular heads on which the case of misrepresentation has been chiefly rested at the bar.

The plaintiff alleges that two printed reports of the directors gave him erroneous information as to the nature of the company's title to large tracts of land. The language of these reports is said to have conveyed to him the belief that the company had a clear and indefeasible title to the land, and might sell or mortgage it before the completion of the railway: whereas he has now discovered that, by the act of the colonial legislature, the title to the land depends on the completion of the railway, to a certain point, within a limited term, and in case the railway be not completed and in full operation within four years, that is, on or before August 23d, 1860, the right to the land is to be wholly forfeited.

But the language of the reports is by no means explicit as to the land. So much progress was making in the construction of the works, that no doubt seems to have been entertained at the date of the latest report that the railway would be completed within the time. It might, however, be inferred from what is said in the latest report that the directors were preparing to make the land a source of immediate profit, and therefore that the title to it was complete.

If the plaintiff purchased his shares under the belief

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that money was to be obtained for the construction of the railway, by means of sale or mortgage of the land, there is no express statement in the report to justify that belief. Nor could he, without further inquiry on that subject, be justified in forming any such belief. Indeed, it does not appear that, before the purchase, his attention was fixed on the present right of the company to the land as a source of immediate profit, or as a means of raising money for the construction of the works. His purchase was of 200 preferential shares, and he admits that before the purchase he was informed that the right to the preferential dividend would depend on the completion of the railway within the limited time. One of the original deeds of grant, of part of the land was shown to him by the secretary, and was in form an absolute indefeasible grant. But his attention does not seem to have been particularly engaged by it, nor did he ask any question about it. All the acts of the colonial legislature relating to the company were produced and shown to him by the secretary, including the Act of the 19 Vic. c. 69, which contains the clause as to the forfeiture of the land, in case of the non-completion of the railway. He took away with him, for the purpose of examination, the two reports of the directors, and he also took away a copy of the colonial Acts, which, unfortunately did not include the Act of the 19th of Victoria.

But the purpose for which he says he wished to examine them, was to make himself acquainted with the constitution of the company. He does not say that he wished to examine them, in order to see how they affected the land. If the land had been much in his thoughts, he would have found in these Acts, of which he did take away copies, that the grants of land therein mentioned were made defeasible, and were to be forfeited in case of non-completion of the railway within a time limited.

Previous to his purchase there was no specific representation made to him, and no specific inquiry made by him, as

to the land, or the title to it, or the right to make it available as the means of raising money for the construction of the railway.

The plaintiff's own statement of what took place after the purchase shows plainly enough that there was not present to his mind anything as to the particular nature and extent of the right to the land which operated as a material inducement to the purchase. Even when he ascertained that the counsel of the company had given an opinion that the land could not be dealt with by sale or mortgage before the completion of the railway, his conduct shows that he did not think that on that point he had to complain of misrepresentation or could ask to have his purchase set aside on that ground. He disputed the construction put upon the Act, and insisted, after a careful perusal of the Acts, that the counsel was mistaken.

The sort of misrepresentation which will avoid a contract must be misrepresentation of a fact. Where the alleged misrepresentation is not as to fact, but on a doubtful question of law, it can scarcely be a sufficient ground for rescinding a contract.

In the third paragraph of the bill the plaintiff himself treats it as a question of law, and having changed the opinion which he says he formed after a careful perusal of the Act, he submits that the said Act clearly deprives the company of all power and right to make any immediate sale either of the said land or of the timber thereon.

All this is enough to show that the plaintiff's case entirely fails so far as relates to the alleged misrepresentation as to the land.

The only other important matter relied on at the bar in support of the plaintiff's case is that he was misled by the specific statement near the end of the report of December, 1857, that the directors had adopted a system of payment in the province of every claim once in six

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weeks, so that the capital account is virtually closed up to that time, and in that way arrears of any kind effectually prevented.

This part of the case is completely met by the plaintiff's statement in the bill. In the month of September, 1858, and several weeks before the completion of his purchase he admits that the secretary told him of the receipt of intelligence from the province that the manager of the company had greatly exceeded his authority, and that there were unexpected liabilities to the amount of about 30,000*l*. As the plaintiff proceeded to complete his purchase after this representation it is impossible to say that he purchased in implicit reliance on the statement, that every claim was paid once in six weeks, and that there were no arrears.

The plaintiff's own letters, written after the purchase, sufficiently show that his causes of dissatisfaction were of a more general kind, and are inconsistent with his having been induced to make his purchase on any specific misrepresentation which can entitle him to set it aside.

His bill must therefore be dismissed, but on the question of costs there are some considerations of importance.

In general, where charges of misrepresentation and misconduct are made, and are not proved, the bill should be dismissed with costs.

This company professes to be established and to conduct its affairs under the provisions of the Limited Liability Act. It is of great public importance that companies which hold themselves out as entitled to the great privileges of that Act should strictly comply with the conditions on which those privileges are granted. If such a balance-sheet, with a full statement of the assets and liabilities of the company, had been given according to the form in Schedule B to the statute 19 & 20 Vic. c. 47, it would tend much to prevent the occurrence of such questions as have been raised in this suit.

It is impossible to approve of the sort of balance-sheet appended to the two reports. Even independently of the provision of that Act, by more careful, accurate, and precise statements on their printed reports and accounts, all ground for raising such questions as have occurred in this suit might well be avoided. This bill must therefore be dismissed without costs.

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Mr. *Locock Webb* asked for the costs of the secretary, who had been made a party as a mere witness.

The VICE-CHANCELLOR.—The secretary is the servant of the company and must look to them for his costs.

The schedule referred to in his Honour's judgment, as set forth in the schedule to the Act, is in the form set out on the following page :—

Dr. BALANCE SHEET of the Co. made up to 18 . Cr.

FORM OF BALANCE SHEET referred to in TABLE B.

CAPITAL AND LIABILITIES.			PROPERTY AND ASSETS.		
I. CAPITAL ..	1	£ s. d.	III. PROPERTY held by the Company ..	4	£ s. d.
	<p><i>Showing:</i> The total Amount received from the Shareholders; showing also:</p> <p>(a.) The number of Shares</p> <p>(b.) The Amount paid per Share ..</p> <p>(c.) If any Arrears of Calls, the Nature of the Arrears, and the Names of the Defaulters.</p> <p>Any Arrears due from any Director or Officer of the Company to be separately stated.</p> <p>(d.) The particulars of any forfeited Shares.</p>	£ s. d.		<p><i>Showing:</i> Immovable Property, distinguishing—</p> <p>(a.) Freehold Land</p> <p>(b.) " Buildings</p> <p>(c.) Leasehold "</p> <p>Movable Property, distinguishing—</p> <p>(d.) Stock in Trade</p> <p>(e.) Plant</p> <p>The Cost to be stated with Deductions for Depreciation in Value as charged to the Reserve Fund or Profit and Loss.</p>	£ s. d.
II. DEBTS AND LIABILITIES of the Company..	2	£ s. d.	IV. DEBTS owing to the Company	6	£ s. d.
	<p><i>Showing:</i> The Amount of Loans on Mortgage or Debenture Bonds.</p> <p>The Amount of Debts owing by the Company, distinguishing—</p> <p>(a.) Debts for which Acceptances have been given.</p> <p>(b.) Debts to Trade-men for Supplies of Stock in Trade or other Articles.</p> <p>(c.) Debts for Law Expenses.</p> <p>(d.) Debts for Interest on Debentures or other Loans.</p> <p>(e.) Unclaimed Dividends.</p> <p>(f.) Debts not enumerated above.</p>	£ s. d.		<p><i>Showing:</i> Debts considered good for which the Company holds Bill or other Securities.</p> <p>Debts considered good for which the Company holds no Security.</p> <p>Debts considered doubtful and bad.</p> <p>Any Debt due from a Director or other Officer of the Company to be separately stated.</p>	£ s. d.
VI. RESERVE FUND ..	3	£ s. d.	V. CASH AND INVESTMENTS..	9	£ s. d.
	<p><i>Showing:</i> The Amount set aside from Profits to meet Contingencies.</p> <p>The disposable Balance for Payment of Dividend, &c.</p>	£ s. d.		<p><i>Showing:</i> The nature of Investments and Rate of Interest.</p> <p>The Amount of Cash, where lodged, and if bearing Interest.</p>	£ s. d.
VII. PROFIT AND LOSS..		£ s. d.		10	£ s. d.
		£ s. d.			£ s. d.
CONTINGENT LIABILITIES ..		£ s. d.			£ s. d.
		£ s. d.			£ s. d.

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WICKHAM *v.* RAWLINS.

May, 1, 3, 4.

THIS bill was filed by Rawlins, a partner in the bank against the executors of his deceased partner Wickham, and against the surviving partner (Bailey out of the jurisdiction), praying that it might be declared that the said partnership was in equity void as regarded the plaintiff, *ab initio*, and that the partnership indenture, dated the 1st of March, 1850, might be delivered up to be cancelled. That the defendants might be decreed to repay to the plaintiff 2500*l.* advanced by him for the purchase of a share in the business, with interest from the date of the indenture down to the repayment of such sum. That the defendants might be decreed to execute to the plaintiff a sufficient indemnity against all outstanding debts and liabilities for which the plaintiff was or might be liable in respect of the said partnership. That all proper accounts and inquiries might be taken in respect of such liabilities and debts. That an account might be taken of all sums which the plaintiff had been required to pay in respect of such debts, &c., and that the defendants might be decreed to repay the same with interest.

Misrepresentation of material facts is a ground for setting aside a partnership contract, and therefore, where a plaintiff entered into a partnership on a representation that the debts of the bank were only 11,000*l.*, whereas they were in fact 26,000*l.*, the Court declared the partnership void *ab initio*, and directed the repayment of the premium, although the plaintiff might *aliunde* have discovered the real condition of the firm.

The defendant Wickham had filed a cross-bill against the plaintiff Bailey.

In and prior to the year 1848, Wickham and Bailey, together with one Jessett, carried on business as bankers at Winchester, Hants.

The bill alleged that in October, 1848, the partners owed to the plaintiff, a country gentleman, at Whitechurch, about twelve miles distant from Winchester, the sum of 2500*l.*, and in the month of November or December in

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that year, Wickham proposed to the plaintiff that he should become a partner in the bank, and which proposal was several times repeated both by Wickham and Bailey, of whom, one owned that it would be inconvenient to the bank to repay the 2500*l.* at that time, but that if he consented to become a partner the debt of 2500*l.* might be taken in payment of any sum which it might be agreed he should pay for a share in the business. The bill alleged that the plaintiff at that time had no wish to embark in the business, and at first declined to accede to the proposal, but was ultimately prevailed upon to entertain the proposal, and with that view demanded information as to the exact state of the banking business. Wickham, as the bill alleged, and also Bailey, in reply, represented to the plaintiff that the bank was in a most prosperous condition, that they had been making 16*l.* or 17*l.* per cent. for their money, and in corroboration of their assertion, produced to the plaintiff certain written statements of account and balance-sheets; but the plaintiff, as the bill alleged, had no opportunity of himself examining the partnership books. Relying on the truth of their representation, the plaintiff, as the bill alleged, agreed with Wickham and Bailey to become a partner in the bank on the retirement of Jessett, and to pay as premium the sum of 2500*l.* On the 19th of February, 1850, Jessett retired, and by virtue of an indenture of partnership, dated the 1st of March, 1850, the plaintiff entered into partnership with Wickham and Bailey. Previously to the execution of such indenture, there had been a discussion among the three partners, whether the plaintiff ought not to reside at Winchester to take part in managing the business; but it was ultimately arranged, that on the commencement of the partnership Bailey should continue as heretofore to reside in the bank and act as managing partner. The bill alleged, that shortly after the commencement of the partnership the plaintiff expressed a wish to take an active part in the

business and to reside at Winchester, and arrangements were made for his doing so, and a house at Winchester was taken by him for that purpose, but that no sooner was the house ready, and the plaintiff about to remove thither, than Wickham and Bailey contrived to prevent his active interference in the affairs of the bank, on the ground, as they alleged, that the customers complained there were too many persons engaged in the bank, and that it would materially injure the concern if the plaintiff's intention of residing at Winchester and taking an active part in the business were carried into effect. In consequence of these representations as the bill alleged, the plaintiff abandoned his intention.

The bill alleged, that whenever the plaintiff desired to examine the accounts or interfere in the management of the bank, he was on one pretext or another prevented by Wickham and Bailey. The plaintiff was dissatisfied with their conduct, and with his position in the firm, and with the mode of carrying on the business, and requested to be allowed to retire, but was met with the objection, that it would injure the concern were he to do so, and was induced to give way out of consideration for the interests of Wickham and Bailey.

The plaintiff and his partners continued to carry on the business of the bank until it was transferred, on the 3d of May, 1854, to the Hampshire Banking Company.

Shortly after the termination of the partnership, the plaintiff, as the bill alleged, for the first time discovered that the statement of account presented, and the representations by which he had been induced to enter the bank and become a partner were incorrect and untrue; that at the time he entered into the partnership, the bank was almost if not altogether insolvent, and that he had incurred heavy liabilities in consequence.

It appeared from evidence, that prior to entering the partnership, the plaintiff was induced to believe that the amount due from the bank to its customers did not

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exceed 11,000*l.*, but that at that very time the real amount was not less than 26,000*l.*, chiefly arising from the embezzlements of a confidential clerk. There was also evidence to show that the plaintiff had been himself urgent in obtaining admission into the firm.

An affidavit was produced made by the plaintiff, upon which the defendants were desirous to cross-examine him, and he being in Boulogne was served with a notice to attend the examiner for that purpose, which notice, however, the plaintiff disregarded. An objection was taken by the defendants to this evidence; but it was overruled by the Vice-Chancellor, on the ground that the proper course was for the defendants to have applied at chambers for a special examiner.

Mr. *Malins*, Mr. *Collier* (of the common law bar), and Mr. *J. H. Palmer*, for the plaintiffs.

The principle on which this Court grants relief against fraudulent misrepresentation is clearly laid down in the case of *Evans v. Bicknell* (a).

Where a person entered into a contract of insurance on the faith of a representation, and it turned out false in a material particular, it was held the policy was void; *Pawson v. Watson* (b). And it is not material that there should be a stipulation that the subject matter of the contract be taken with all its defects: *Schneider v. Heath* (c).

Burrowes v. Lock (d), *Blair v. Bromley* (e), were also cited on the point how far one partner was bound by the representation of his co-partner.

See also *Harris v. Kemble* (f); *Edwards v. M'Leay* (g).

NOTE.—The effect of partial misrepresentation is not to alter or modify the agreement *pro tanto*, but to destroy it entirely: *Clermont v. Tasburgh*, 1 Jac. & W. 112.

(a) 6 Ves. 174.

(b) Cowp. 785.

(c) 5 Camp. 306.

(d) 10 Ves. 470.

(e) 2 Phill. 354.

(f) 2 Dow. & C. 463, 471.

(g) 2 Swanst. 287; s. c. Coop. 308.

Mr. *Bacon* and Mr. *G. L. Russell*, for the defendant Wickham, contended that the plaintiff had had ample means of ascertaining the real state of the firm had he chosen to avail himself of the opportunity, and could not now claim the assistance of this Court in a case where his loss was the result of his own neglect. Secondly, it was contended that on the part of Wickham there was no wilful misrepresentation; he stated what he believed at the time to be the truth.

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No contract for a partnership, whether made between two or more individuals, where one of them enters into it upon the faith of a representation which turns out to be false, can be allowed to stand. It has been argued that in cases of this kind all that a court of equity ought to do is, to compel the persons proved to have been guilty of making a false representation to make such representation good. That, however, is not the doctrine of this Court when dealing with questions of partnership. The plaintiff Rawlins, being desirous of entering into partnership with the late James Wickham and the defendant Charles Bailey, was presented—he says twice, certainly once—with a statement of the affairs of the then existing firm into which he wished to enter. This statement represented that the amount due from the existing firm to its customers was 11,000*l.* only; whereas it has been established in evidence, beyond all doubt, that at the time when the sum of 11,000*l.* was represented to him as the amount of the liabilities, the amount due to the customers was not less than 26,000*l.*

The first topic of defence is, that the means of verifying the representations were open to the plaintiff by examination of the books. But that is no defence against a charge of misrepresentation. It frequently happens that the means of ascertaining the truth, in cases of this nature,

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are within the power of the complainant. But it has never been held that, in order to entitle him to rescind his contract, he is bound to show that he has resorted to all the sources of information within his power. The very motive of the misrepresentation generally is to check inquiries of this nature. In the case of *Maddeford v. Austwick* (a) one partner agreed to purchase his co-partner's share in their joint business for a sum which he knew from the accounts in his possession was an inadequate consideration. There the contract was set aside, although the misrepresentation was one which might readily have been detected by the partner to whom it was made.

The second ground of defence is, that the late James Wickham was himself deceived in the matter, that he himself honestly believed the truth of the representations which he made. Then who made the false representation? The defendant Charles Bailey? But when the late James Wickham and the defendant Bailey were about to enter into partnership with the plaintiff Rawlins, if Mr. Wickham thought fit to intrust the defendant Bailey to represent to the incoming partner the actual state of affairs, and if in consequence of the representations so made, the partnership formed upon the strength of those representations is to be dissolved, then, so far as regards the defendant Bailey, the whole contract is at an end. But it is of no consequence whether the guilty foundation of this contract lay with the defendant Bailey, or the late James Wickham, or, as had been alleged, with a person who was at that time the clerk of both partners. The principles of equity with regard to the law of principal and agent make it necessary to declare that both the defendant Bailey and the late James Wickham are answerable for the effects of the falsehood, and that the contract in question cannot stand. All that has been urged with reference

(a) 1 Sim. 89.

to the innocence of the late James Wickham in regard to the falsehood of this misrepresentation, and the honesty and *bona fides* of his conduct is clearly beside the question.

The other matters which have been discussed appear to have reference rather to the question of costs than to the actual measure of relief to which the plaintiff must be held entitled. It has been insisted as an answer to the whole relief prayed by the bill, that the plaintiff Rawlins almost forced himself into the partnership which he is now so anxious to disclaim, and one of his letters has been referred to in which he states to the effect that the concern was in a depressed state, and unless he were allowed to step in quickly the most distressing consequences must ensue. There can be no doubt but that the plaintiff was aware of the "difficulties with which the partners were contending, but that knowledge, although it may be a very sufficient ground for imputing rashness and want of caution to the plaintiff, is no excuse whatever for misrepresentation. The effect of the misrepresentation was to make a confessedly bad state of things look better than it really was. Still, it is a circumstance which ought to weigh on the question of costs, and there are in this case other circumstances which are not favourable to the aspect of the plaintiff's case.

The plaintiff's case has been greatly over-stated in the bill. That is not an unusual circumstance where relief is sought upon the ground of alleged fraud, but it is a highly injudicious course to take. The parts of the bill in which these erroneous statements occur are many in number, There is an allegation to the effect that the plaintiff entered into the partnership most reluctantly, and that he did so solely at the inducement and persuasion of the late James Wickham and the defendant Bailey. But it is clear, upon the evidence, that the plaintiff was more anxious himself to plunge into this ruinous concern than those partners were to invite him to join them. Nor must

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it be forgotten that after the plaintiff had entered into the partnership, knowing, as he did, that owing to the particular state of the country in 1848, the concern was not in such a flourishing condition as it had been, and after discovering that it was, in fact, in a state of extreme embarrassment, he nevertheless went on with it for between three or four years without ever complaining of the misrepresentation which had been made to him. Looking at the whole conduct of the plaintiff, and at the sort of allegations which have been inserted in his bill, the Court, although it must set aside that contract into which in February, 1850, he entered, cannot allow the plaintiff his costs against the estate of Wickham, or the costs of the cross bill.

Ordered that the cross bill must be dismissed without costs. This Court doth declare that the partnership entered into by the deed, dated the 1st of May, 1850, is void and invalid as between the parties thereto, and that the said deed ought to be set aside, and decree accordingly, &c. Declare that the defendant Bailey, and the estate of James Wickham deceased, are bound to repay the plaintiff Rawlins the sum of 2500*l.* paid by him as consideration for a share in the business, with interest thereon at 4*l.* per cent. from the date of the deed. Declare that the defendant Bailey and the estate of Wickham are bound to indemnify the plaintiff against all the outstanding debts, sums of money, and liabilities to which the plaintiff has or may become subject and liable to pay in respect of the partnership dealings, &c., of the alleged partnership or in relation thereto. And it is ordered that the following accounts and inquiries be taken.

First, an account of the outstanding debts and liabilities, &c.

Secondly, an account of what is due to plaintiff in respect of the sum of 2500*l.* and interest.

Thirdly, an account of all sums, &c. paid by plaintiff in

respect of partnership debts, &c., with interest at 4l. per cent. from the day of payment, and in taking such account the plaintiff to give credit for all profits drawn by him, &c., with interest at 4l. per cent., and the defendants the executors not admitting assets sufficient, &c., it is ordered that the plaintiff be at liberty to go in under the decree of *Graham v. Wickham*, dated the 17th of January, 1857, at the Rolls. That the receiver be continued, and to pay the balance into court. Tax plaintiff his costs of first-mentioned suit, to be paid by Bailey. Adjourn further consideration. Liberty to apply.

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Reg. B. 1857, fo. 1155, 4th of May, 1858.

Affirmed by the Lords Justices on the 16th December, 1858.

THE ATTORNEY-GENERAL v. THE MAYOR,
ALDERMEN, AND BURGESSES OF THE
CORPORATION OF SOUTHAMPTON.

Dec. 7.

THIS was an information filed on the relation of certain inhabitants of Southampton, praying that it might be declared that on the true construction of the Act certain land, known as the cricket ground, ought to be used for purposes of public recreation, subject to certain rights of common, and that it was a breach of trust in the defendants to remove the Above Bair Fair to the cricket ground or to or upon the Itchen Bridge Road.

Where land was directed by a local Act to be put and kept in proper condition for purposes of recreation, the Court restrained a corporation from holding thereon a fair at which cattle were sold.

The bill also prayed for an injunction to restrain the alleged breach of trust.

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On the 10th of May, 1859, the relators applied for an injunction in the terms of the prayer of the bill, but on the defendants undertaking to restore the cricket ground the motion was directed to stand over till the 1st day of Michaelmas Term then ensuing.

In 1844 an Act was passed called "The Southampton Marsh Improvement Act," 7 & 8 Vic., c. 54, conferring certain powers on the corporation. Shortly after the passing of the said Act, the corporation, in pursuance of sections 17 & 18 caused a piece of ground forming the north-western portion of the marsh, containing 4*a.* 1*r.* 17*p.* to be put in proper condition for public recreation, which has been since known as the "Cricket Ground," and on it the householders paying scot and lot had enjoyed some rights of common and of recreation and other public rights.

On the 4th of April, 1859, the defendants issued a public notice that the Above Bair Fair should cease to be held in the fair field, and thereafter yearly shall be holden on a specified part of the north-western portion of the marsh bounded by the Itchen Bridge Road, *i.e.*, the cricket ground.

The inhabitants, being dissatisfied with this proceeding, held a public meeting and passed a resolution disapproving of the proposed change, and ultimately caused this information to be filed.

The 117th section reciting that the north-western portion of the marsh, &c., containing 4*a.*, &c., was better adapted, and might be made more available for the purposes of recreation than the other portion of the marsh: "Enacted that except as hereinafter provided no such notice shall be given by the mayor to extinguish any right of common or recreation, or other public right over the said north-western portion of the marsh. Provided that for the purpose of enabling the roads on the northern and western sides of the same portion of the marsh to be improved, it shall be lawful for the mayor, aldermen, and burgesses, to give notices, &c., to extinguish all rights of

common and other rights affecting such parts of the same portion of the marsh as may be required for the improvement of the same lands.

The 27th section provided that the Itchen Bridge Road was not to be altered in its course, reduced in width, or rendered less commodious for public traffic than it now is.

Mr. *Malins* and Mr. *Cracknall*, for the relators, contended that the Act had dedicated the land to the purposes of recreation, and if that were so, it was clear from the construction of the Act that they had no power to use it for purposes other than those of recreation. Secondly, it was submitted that to hold a cattle fair on the cricket ground was not authorized by the Act.

Mr. *Bacon* and Mr. *Shebbeare*, for the corporation, contended that a fair was a place of recreation, and was so defined by Johnson and Richardson *in locis*. Dugdale in the "History of Warwickshire," p. 680-1, citing Spelman (a), defined a fair as Festum. In the "Shepherd's Week," Gay referred to a fair as a place of amusement, and the same occurred in a passage from Dryden :

"His corn, his cattle, were his only care,
And his supreme delight a country fair."

(a) "Feria pro nundinis item a feriando dicitur plerisque; Europeorum linguis, exemplo Pop. Romani in his feriebanantur. Festus, lib. 12: 'Nundinas feriarum diem esse voluerunt Antiqui quo rustici Meroandi Vendendique causâ in urbem convenirent, eumque nefastum ne si liceret cum populo agi interpellerentur nundinatores.' Feria tamen pro nundinis nusquam (quòd sciam) occurrat Antiquè. Cum autem Christiani ad insignes aliquas Celebritates, præsertim encœnia et dedicationis Ecclesiarum, festa annua

peragenda convenirent; adeo utique mercatores solebant, sua mercimonia sub ipsis Ecclesiis utque in cœmeteriis distracturi:" *et seq.*—*Spelman's Gloss. Feria* 222.

"The ancient nundinæ or fairs of Rome were kept every ninth day; afterwards the same privileges were granted to the country markets, which were at first under the power of the Consuls."—*Arbuthnot on Coins*.

"It is a fact markets were formerly held on Sundays."—*Webster's Dict. in loco*.

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It was also contended that, on the true construction of the Act, the corporation had a discretion to hold the fair on such land.

The VICE-CHANCELLOR:—

'This information is filed to protect a piece of land, which covers about four acres, and which in the bill is called the "Cricket Ground," from being used by the corporation of Southampton for the purpose of holding a fair. The corporation have very large powers, and the 139th section of their Act has express reference to the removal of the fair. Before this information was filed the fair had been held upon a piece of ground which seems to have been leased to a person of the name of Drew. The 49th section authorizes the corporation to purchase Drew's interest, and the 139th section empowers them to remove the fair to "such parts of the waste lands in South-

NOTE.—The sections of the Act were as follows:—

Sec. 18:—"And be it enacted that the mayor, aldermen, &c., shall with all convenient speed after the passing of this Act, cause the said north-western portion of the marsh to be drained and levelled, and to be put and kept in a proper condition, for purposes of public recreation, and the same portion shall for ever thereafter be subject to such rights of common and of recreation and other public rights as have heretofore been exercised and enjoyed therein."

Sec. 118 was as follows:—After reciting that by reason of the several powers and authorities thereby granted to the mayor, aldermen, and burgesses, as had been so granted, and that the

several sums thereby authorized to be offered and paid and accepted as the compensation for the purchase of lands had been so authorized to be offered and paid and accepted, for the sole purpose, and in consideration, and on the condition of the land purchased and taken under the authority of such Act being devoted for ever thereafter, subject to the provisions of the said Act exclusively, as open spaces for the general and public advantage of the inhabitants of Southampton, and of all other persons interested in the same, being so devoted; and by reason also that the parties interested in resisting the passing of this Act have assented to the several provisions therein contained, in the full faith and confidence that such purpose

ampton as they shall think fit." In this section the language is very wide, but it must be construed so as to make it consistent with the other provisions of the Act.

The piece of ground which is now in question is the subject of two express clauses of the Act, which speak of it in very distinct terms. The 17th section describes these four acres or thereabouts as "better adapted and more available for the purposes of recreation than the other portions of the marsh," and the 18th section directs that this same portion of the marsh shall be "put and kept in a proper condition for purposes of public recreation, and the same portion shall for ever thereafter be subject to such rights of common, and of recreation, and other public rights as have heretofore been exercised and enjoyed thereon." This language is so plain as to admit of no doubt. According to the plain meaning of the language, if, as has been argued, a cattle fair is a sort of recreation, it must be shown that it is such a recreation, and such a right as has "heretofore" been exercised and enjoyed on

should for ever be strictly observed, it was enacted "that such parts of the said common fields as for the time being should have been by the mayor, aldermen, and burgesses purchased, taken, or acquired for the purposes of the said Act, should be devoted and kept subject to the provisions of the said Act exclusively, as open spaces for the general and public advantage of the inhabitants of Southampton, and of all other persons for the time being interested in the same being so devoted and kept."

The 116th section provided that except as therein otherwise provided, all the waste lands vested in the corporation should for ever remain subject to the same rights

The 139th section:—"And be it enacted that after the mayor, aldermen, and burgesses shall, in pursuance of this Act, have purchased or taken for the purposes of this Act, the leasehold or other interest of the said John Watkins Drew, his executors, administrators, or assigns, in the said Fair Field, it shall be lawful for the mayor, aldermen, and burgesses, at such time as they shall think proper, to cause a notice to be affixed on the outer doors of the Guildhall of Southampton, and on or near the doors of all the churches and chapels in Southampton, and to be made public in such other way as the mayor, aldermen, and burgesses shall think proper, declaring that the annual

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this piece of land. But as it is certain that no fair of any kind has ever been held on this ground, the proposed Fair cannot be sanctioned. By the 117th section power is given to the corporation to appropriate such particular portions of the waste lands as they shall think proper "exclusively for the recreation of the inhabitants of Southampton, or otherwise, as open spaces for the public advantage of the inhabitants of Southampton, as to the corporation shall seem meet;" and by the 116th clause all the waste lands are to be subject to existing public rights, "except as herein otherwise provided." It appears from all this, that the legislature did not intend to intrust the corporation with a discretion as to these four acres; and it is no longer in the power of the corporation to say that these four acres are to be exclusively dedicated to the same rights of recreation as have "heretofore" been exercised and enjoyed thereon if they be devoted to the

fair holden on or about the 6th and 7th days of May, in certain places in the parish of All Saints, in Southampton, shall from the time of affixing such notice cease to be holden in such places, and shall thenceforth be removed to, and for ever thereafter yearly, on the second Wednesday and following day, be holden on such parts of the waste lands in Southampton, for the time being vested in the mayor, aldermen, and burgesses, as they shall think fit; and the said fair shall for ever after the affixing of such notice be removed and holden according to the terms of such notice, and at no other place than shall be expressed in such notice, and on no other day than the second Wednesday in May, and the day following."

Sec. 140:—"And by reason that the several powers and provisions of this Act are for the benefit of the mayor, aldermen, and burgesses, and commoners, and other inhabitants of Southampton, be it enacted, that no consideration or compensation whatsoever shall be claimed by or on behalf of the mayor, aldermen, and burgesses, or the commoners or other inhabitants of Southampton, in respect of any land of the mayor, aldermen, and burgesses, taken or affected for the purposes of this Act, or of any right of common, right of recreation, or other right of a public nature extinguished, abridged or otherwise affected in the execution of the same several powers and provisions respectively."

purpose of holding a fair. Taking the 18th clause, and construing the 139th clause by the light of it, it is quite plain that the corporation must look for some other pieces of waste land than that included in the 18th section for the purpose of holding this fair. The general words in section 139, which allow them to fix upon such part of the waste lands as they may think fit, on which to hold the fair, must be read as controlled by the particular words of the 18th section. Therefore, I think it is perfectly clear that in fixing upon these lands as a place in which the fair is to be holden the corporation have contravened the Act of Parliament.

Another provision is as to the Itchen Bridge Road. The Act says with reference to the Itchen Bridge Road that it shall not be lawful for the corporation so to deal with this road as to render the same "less commodious for public traffic than it now is." The information complains that for at least two days in the year the public traffic has been rendered much less commodious by having the fair held on this piece of ground, and the evidence seems to justify that view. However, upon the construction of this clause, there is this observation, that the main purpose of the clause is to prevent the narrowing of the road, and therefore it does not interfere with the construction of the clause to say that it was not inserted in order to prevent any alteration in the adjoining waste lands which might interfere with the commodiousness of the road for public traffic. What the Act says is, that it shall not be lawful "to alter the course of the road or to reduce the width thereof to a less width than sixty feet, or otherwise to render the same less commodious for public traffic than it now is." It can hardly be said that the road has not been rendered less commodious than it now is for at least two days in the year, and these words are perfectly general. But I do not decide the case upon that ground. It seems to me that it must be governed by

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the 18th clause. I regret that this dispute has arisen. Something is due from the governing body to the inhabitants of every town, in order to conciliate the peace and good-will of all. The corporation have said, that by this decision they will be fettered in the exercise of their powers by a small section of the inhabitants. The powers of the corporation should not be fettered by any small section of the town; because the powers of the corporation are given to them for the benefit of all. But in this case the Corporation are fettered by the Act of Parliament, and I hope it will not be supposed that this restriction has been imposed by any small portion of the inhabitants. I must make the injunction perpetual in the terms of the prayer of the bill; but at the same time I cannot refrain from expressing a hope that when this dispute is ended, good feeling will be restored.

Mr. *Bacon* asked for the costs, on the ground that the allegations of the bill were not borne out by the evidence; but

The VICE-CHANCELLOR said he did not think so; and that he could not depart from the usual rule, that the successful party should have their costs.

THE CONSOLIDATED INVESTMENT AND
INSURANCE COMPANY v. RILEY.

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Dec. 8.

THIS bill was filed by an Assurance Company, praying—

First, That it might be declared that the plaintiffs are entitled to be paid out of the share or shares of the defendant John Riley, in the monies to arise from the sale of the real and personal estate of Thomas Green, what might be due to them, by virtue of the indenture of the 26th of June 1855, in priority to the defendant Isaac Dodd.

Secondly, For an account what was due under the said indenture.

Thirdly, That the defendants might be decreed to pay what should be found due with costs, or in default, that they might be foreclosed, &c., or that the said share or shares might be sold, &c., and the proceeds applied according to the interests of the plaintiffs and defendants.

Thomas Green, late of Rumworth, in the county of Lancaster, publican, being at the date of his will, and at the time of his death, seised of the freehold hereditaments and possessed of the leasehold hereditaments mentioned in the will, and of some personal estate, duly made his will bearing date the 16th of April, 1832, so as to pass freehold estates by devise, and thereby gave to his wife, Ann, the use of all his household goods and everything in and belonging to his dwelling-house, so long as she continued his widow; and after stating that he had three houses situate in Green Street, in the township of Great Bolton, being freehold, and seven houses situate in the township of Rumworth, being leasehold, he gave the rents issuing and arising from the before-mentioned houses to his said wife, Ann, for life or

Gift by a testator of the rents of his freehold and leasehold estates to his widow and daughter as executrixes, for the life of his widow, with a direction, after her death, to sell the property, and to divide the proceeds equally among his children. One of the children mortgaged his reversionary interest to A., who gave no notice, and afterwards to B., who gave notice to one executrix who communicated it to the other. Held, B. was entitled to priority.
Wiltshire v. Rabbits (a), observed on.

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widowhood, for the maintenance of his children; and reciting that he had purchased the house in which he then lived, a small plot of land, and other outbuildings contiguous to the house, he gave the rents and profits arising from the said house to his said wife Ann, so long as she lived and continued to be his widow. If at the death or marriage of his said wife, his (testator's) youngest child should have attained twenty-one years, then he ordered that his executrixes or the survivor of them, and the executor or administrator of such survivor, should sell all his freehold and leasehold property and household furniture, and the monies arising therefrom he gave to be equally divided amongst his children, Alexander, Ellen, Catherine, Jane, Ann, and Mary, and directed that the defendant, John Riley, son of his wife Ann, should have an equal share with his other children; but if any of his children should happen to die, leaving no lawful issue, before the death or marriage of his said wife, then the whole of the money should be equally divided amongst his surviving children and the aforesaid John Riley, share and share alike, except such deceased son or daughter, or the said John Riley should leave lawful issue, then he directed that the child or children of such deceased son or daughter, or the child or children of the said John Riley should have such share as would have belonged to their respective father or mother, share and share alike; and he appointed his said wife Ann, and his sisters Ellen Green, Jane Green, and Ann Green, spinsters, executrixes of that his will and testament.

Thomas Green died on the 13th of May, 1832, without having altered his will, which was proved on the 11th of November, 1832, by his four executrixes. Ellen Green, and Jane Green died, leaving Ann Green, the sister, who married John Lomax, and Ann Green, the testator's widow, surviving. The widow had continued unmarried.

John Riley by an indenture dated the 10th of March,

1854, assigned his interest under the testator's will to one Isaac Dodd, to secure 120*l.* and interest. It was admitted that Dodd gave no notice to the executrixes or to any one else of this assignment. A large sum was now due from Riley for principal and interest.

By an indenture bearing date the 26th of June, 1855, and between the defendant John Riley, of the first part, John Marsh, of the second part, and plaintiffs of the third part, in consideration of the sum of 100*l.* lent to John Riley by the plaintiffs, the defendant John Riley did assign unto the plaintiffs all the one-seventh part or share, or other the part or share, to which the defendant John Riley then was or thereafter might become entitled, and either by virtue of the said will, or in any other manner, in the real and personal estates and effects of the said testator, and the proceeds thereof, and the rents and income of the same respectively; and also all that policy of the said company numbered 1317, whereby 300*l.* were assured to be paid to the executors, &c., of the said John Riley, at his decease, under the annual premium of 9*l.* 5*s.* 3*d.*; to hold the said premises unto the said company, their successors or assigns, upon certain trusts therein mentioned, for securing payment to the plaintiffs by the said John Riley, of the sum of 100*l.*, with interest, at the rate of 5*l.* per cent. per annum, for such sum, or the unpaid part thereof for the time being, by twelve instalments on the 26th of September, 26th of December, 26th of March, and 26th of June in each year, until the same should be fully repaid, commencing on the 26th of September then next; every such instalment to consist of one-twelfth part of the said sum of 100*l.*, and three calendar months' interest on the said sum of 100*l.*, or the unpaid part thereof for the time being, and also for securing payment of the premium on the said policy, and any fine or fines incurred in respect thereof.

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The plaintiffs on the 5th of July, 1855, gave notice to Ann Green as one of the surviving executrixes, of the indenture of the 26th of June, 1855. Ann Green within a few days afterwards, as appeared by the evidence, communicated the notice to Mrs. Lomax, the other executrix. The plaintiff's solicitor, before the advance was made, applied to Ann Green to know if she had received any notice, or knew of any assignment or charge by John Riley on his interest in expectancy under the testator's will, to which she replied in a letter dated the 9th of May, 1855, addressed to the plaintiff's solicitor, containing the following passage:—

“My son John Riley has not made any assignment or mortgage to my knowledge; he has no interest at all, nor anything to do with it till after my death.”

John Riley failed duly to pay the instalments, and allowed the policy to lapse, and there remained due to the plaintiffs, 91*l.* 10*s.* The testator's widow is still living.

The plaintiffs then filed this bill.

Argument.

Mr. *Schomberg*.—It is admitted that the defendant Dodd was prior in point of time, but gave no notice whatever to the executrixes. It was also admitted that the plaintiff gave notice to Ann Green the widow, and it was proved that she, within a few days afterwards, communicated that notice to her co-executrix. A notice, however, to one trustee was enough, so long as that trustee was living: *Meux v. Bell* (a).

The principle applicable to choses in action was that an incumbrancer or purchaser must give notice of his title to the person who would have to distribute the property, that is, to the person through whom the owner must derive the fund when it falls into possession. Admitting for the argument's sake, that by the deed of

(a) 1 Hare, 73.

1854, an interest in freehold estate passed to Dodd, that would not give him priority, because here the land, the subject matter, was a chose in action.

Smith v. Smith (a) was cited.

Mr. *Karslake* for the defendant Dodd.

It was admitted that the doctrine of notice did not apply to real estate, and in *Wiltshire v. Rabbits* (b), it was held that the doctrine did not extend to the assignment of an equitable interest in a chattel real.

In *Lee v. Howlett* (c), Vice-Chancellor Wood expressly laid it down, that the notice must be given to the parties through whom the property must pass. Here, as in the case before Vice-Chancellor Wood, there was no estate in the donee of the power of sale, and in the event of the testator's widow predeceasing his daughter, the power of sale must be exercised by the daughter and not by the widow, to whom notice was given.

In truth, the proper person to receive notice was, in this case, the testator's heir, who might effectually convey the estate without either of the executrixes joining in the deed.

The following cases were also cited:—*Loveridge v. Cooper* (d), *Jones v. Jones* (e), *Foster v. Blackstone* (f), s. c. *Foster v. Cockerell* (g), *Dearle v. Hall* (h), *Timson v. Ramsbottom* (i), *Row v. Dawson* (k).

The VICE-CHANCELLOR:—

The only doubt I have felt in this case arises from the decision in *Wiltshire v. Rabbits*. But in the case of

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- (a) 2 C. & M. 231.
- (b) 14 Sim. 76.
- (c) 2 K & J. 531.
- (d) 3 Russ. 1.
- (e) 8 Sim. 633.

- (f) 1 M. & K. 297.
- (g) 9 Bligh, 332.
- (h) 3 Russ. 1.
- (i) 2 Keen, 35.
- (k) 2 Tud. Lead. Ca. 612.

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Foster v. Blackstone the House of Lords decided that money to be produced by the sale of land is within the doctrine of notice. *Wiltshire v. Rabbits* cannot easily be reconciled with *Foster v. Blackstone*.

In the present case the property assigned was of such a description that, as between the two assignees, the later in date might establish his priority over that prior in date by notice; and the plaintiffs as assignees, by having given proper notice, might acquire a priority over the defendant Dodd, though later in date; for Dodd, it is admitted, gave no notice.

The property is in this singular situation as to the trusteeship. The power of sale was to arise on the death or marriage of one of the executrices. The executrix to whom the notice was given was the lady on whose death the power was to arise unless she had married. She has not married. If the question had arisen on notice to her alone, there might be a question as to the power of the Court to postpone Dodd's deed. But it appears that, of the only two persons to whom notice was necessary to be given, Mrs. Green and Mrs. Lomax, Mrs. Green received the notice, and within a day or two after Mrs. Green gave notice to Mrs. Lomax. These two persons together, upon notice being proved to have been given to both, are in a position to hold the property, when sold, as trustees for those claiming under John Riley. Notice to the two is sufficient to establish priority, and as direct notice has been given to one, who gave notice to the other, it must be considered that complete notice has been given to the two proper persons. That being so, I come, though with great reluctance, to the conclusion that the plaintiffs are entitled to priority.

The Court is bound to declare that the plaintiffs are entitled to priority over the defendant Dodd, and to a decree for an account, and an inquiry of what is due to them for principal and interest on the mortgage security.

TUCKER *v.* LOVERIDGE.

1858.

April 23d.

WILLIAM TUCKER of Coryton House, Devonshire, by his will, dated the 23d of February, 1855, having appointed Charles Warre Loveridge, Charles John Vigne, and Sir John George Reeve de la Pole, Bart., the executors and trustees of his will, gave certain specific legacies, and then proceeded as follows:—

“I give and bequeath all the rest and residue of my personal estate and effects of what nature and kind soever and wheresoever situate, except chattels real, if any, unto my dear wife, Louisa Tucker, absolutely.”

The testator then gave, devised, and appointed all the messuages situated in the parishes of Axminster, Claindon, &c. &c., Devon, and all other his real estate whatsoever in possession, reversion, &c., including chattels real of which he was possessed, or over which he had disposing power (except estates vested in him by way of mortgage), to his trustees, upon trust, as soon as conveniently might be after his decease, by mortgage of all or any part of the devised lands, to raise such monies as should be required for payment of his funeral and testamentary expenses, debts, and the legacies given by the will, and the legal duty thereon. And he declared that his funeral and testamentary expenses, debts, legacies, and legacy duty, should be payable out of the monies to be raised by mortgage as aforesaid, in absolute exoneration of his personal estate. The testator then directed that his trustees should stand possessed of the said lands, &c. &c. upon trust for his wife, Louisa Tucker, for her life, without impeachment of waste, but so that she should not fell timber or work mines, for her separate use; and after her decease, on trust for Charles Tucker, his heirs and assigns; and in default of

A testator under covenant, on his daughter attaining twenty-one or marriage, to pay to trustees 10,000*l.* for her benefit—with a declaration, that in case she died leaving no child who should attain twenty-one, or if a daughter should marry, it should form part of his personal estate—during his daughter's minority, in order to liberate his estate, borrowed 10,000*l.*, which was paid to the trustees, who released the covenant, and lent a portion of the fund to the testator on the security of his real estate. The daughter having died under age, and unmarried—*Held*, that the 10,000*l.* having been actually raised, passed under the testator's will as his personal estate.

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issue, remainder to the Rev. Marwood Tucker for life; remainder to his youngest son. Then followed certain provisions immaterial to the present question.

The testator died on the 11th of March, 1855, and his will was proved in the April following by his executors and trustees.

The personal estate consisted in part of a sum of 10,000*l.* invested in the names of Charles Warre Loveridge and Henry Bellamy Shuttleworth King, as the trustees of an indenture of the 23d of June, 1849, in favour of Helen Tucker, the testator's only child, who died on the 13th of July, 1855, an infant, never having been married.

By the indenture of settlement of this date, between the testator of the first part, and the trustees of the second part, reciting that the said William Tucker was desirous of making a provision in favour of his daughter, Catherine Helen Tucker, it was witnessed in consideration of natural love and affection, as follows:—

“ That in case the said Catherine Helen Tucker shall live to attain the age of twenty-one years, or shall marry under that age with the consent of the said William Tucker, or of her guardian or guardians for the time being, or in case the said William Tucker shall die in the lifetime of the said Catherine Helen Tucker, and before she shall have attained twenty-one, or have married with such consent as aforesaid, then, and in either of such cases, he, the said William Tucker, his heirs, executors, or administrators, shall and will immediately upon the said Catherine Helen Tucker so attaining the age of twenty-one years, or marrying with such consent as aforesaid, or in case of the death of the said William Tucker in the lifetime of the said Catherine Helen Tucker, and before she shall have attained twenty-one, or have married with such consent as aforesaid, then within six calendar months next after his decease, pay, or cause to be paid unto the said Charles Warre Loveridge and Henry Bellamy Shuttleworth King,

or the survivor of them, or the executors or administrators of such survivor, or their or his assigns, or other the trustees or trustee for the time being of these presents, the clear sum of 10,000*l.* sterling; and that in case default shall be made in payment of the said sum, or any part thereof, as aforesaid, then the said William Tucker, his heirs, executors, or administrators, shall and will pay, or cause to be paid to the said trustees or trustee for the time being, interest for the same at the rate of 5*l.* per cent. per annum until the day of actual payment thereof, such interest as aforesaid to be paid half-yearly on the 25th day of March and the 29th day of September in every year without any deduction (the income tax only excepted), the first payment thereof to be made on such one of the said days as shall happen next after the said Catherine Helen Tucker shall have attained the age of twenty-one years, or have previously married with such consent as aforesaid. And further, that in case the said William Tucker shall depart this life in the lifetime of the said Catherine Helen Tucker, and before she shall have attained the age of twenty-one years, or shall have previously married with such consent as aforesaid, then the heirs, executors, or administrators of the said William Tucker shall and will, within six calendar months after such decease of the said William Tucker, pay or cause to be paid to the said trustee or trustees for the time being the said sum of 10,000*l.*, and interest thereon, at the rate aforesaid, from the day of the decease of the said William Tucker until the day of the actual payment thereof.

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* * * * *

“ And it is hereby agreed and declared that the trustees or trustee for the time being shall stand and be possessed of the said trust-monies, stocks, funds and securities, and the interest, dividends, and annual income thereof respectively, upon trust that they the said trustees or trustee for the time being, do and shall during the minority and

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discovery of the said Catherine Helen Tucker, pay and apply the whole or such part as the said trustees or trustee for the time being shall think fit, of the said interest, dividends, and annual income for or towards the maintenance and education of the said Catherine Helen Tucker in the mean time, and until the said Catherine Helen Tucker shall attain the age of twenty-one years, or marry with such consent as aforesaid, which shall first happen.

“ And it is hereby agreed and declared that immediately after the said Catherine Helen Tucker (being an infant and discover at the time of the decease of the said William Tucker) shall have attained the age of twenty-one years or have married with such consent as aforesaid, which shall first happen, the said trustees or trustee for the time being do and shall stand possessed of the said sum of 10,000*L*, and the stocks, funds, and securities in or upon which the same shall or may for the time being be laid out and invested, and the said interest, dividends and annual income thereof, and also, in the events in that behalf hereinbefore contained, of the said accumulations (if any), and the stocks, funds, and securities in or upon which such accumulations shall or may for the time being be laid out or invested, and the interest, dividends and annual income of the same upon and for the trusts, intents and purposes and with, under, and subject to the powers, provisions, agreements, and declarations hereinafter declared, expressed and contained of or concerning the same.

* * * * *

“ And it is hereby agreed and declared, that in case there shall be no child of the said Catherine Helen Tucker, who being a son shall attain the age of twenty-one years, or being a daughter shall attain that age or marry, the said trustees or trustee for the time being shall stand and be possessed of the said trust premises, and interest, dividends and annual produce thereof, or of so much thereof respectively as shall not have become vested or

been applied under any of the trusts or powers herein contained in trust as part of personal estate of the said William Tucker, and to be paid over, transferred and assigned accordingly."

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It appeared that, in 1852, the testator was desirous of borrowing a sum of money from the Atlas Insurance Company on the security of his real estates, and this company before granting the loan, required that the charge should be satisfied. Accordingly, on the 6th of October, 1852, the sum of 10,000*l.* was borrowed from the company and paid by the testator's direction to the trustees, who thereupon executed a release of the charge which was indorsed on the settlement.

On the 7th of October, 1852, 2500*l.*, part of such 10,000*l.*, was lent by the trustees to the testator on the security of the said estates. And on the 27th of April, 1853, a further sum was also advanced on the same security, making a total of 4500*l.*

The bill was filed by the testator's widow, to whom he had bequeathed the whole of his personal estate, praying to have the testator's estate administered under the order of the Court. A petition was also presented by the plaintiff in the cause, praying that it might be declared that the sum of 10,000*l.* formed part of the testator's personal estate, and might be paid, or the securities on which it was invested might be transferred to the plaintiff.

Mr. *Bacon*, and Mr. *Hanson*, for the plaintiff.

Argument.
—

It is admitted that the testator was under no necessity to raise the fund, and that had he omitted to do so the claim could not have arisen. But the true test was not the intention, but the effect of the act done as affecting real and personal representatives.

Where two persons had conflicting claims on a freehold estate, and agreed to sell it and divide the proceeds, and until the sale that a receiver should be appointed to collect the

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rents, but one died intestate before the sale, it was nevertheless held that there had been a conversion: *Hardey v. Hawkshaw* (a).

Barham v. The Earl of Clarendon (b), *Lechmere v. The Earl of Carlisle* (c), were also cited.

Mr. *Malins*, and Mr. *Osborne*, for the defendant.

If the money had not been raised accidentally, it was quite clear in the event that happened it never would have been raised at all.

Until the time arrived for raising the amount, the Court would not deprive the infant of her right to the security of the real estate: *Dickinson v. Dickinson* (d); and therefore the act by which the money was raised was premature and inoperative as regarded the rights of the parties.

Secondly, as to the portion of the fund which had been received by the testator himself on mortgage, it had been at home, and the trust had therefore determined. It formed part of the real estate: *Godsal v. Webb* (e).

Evans v. Scott (f), *Chaplin v. Horner* (g), were also cited.

Mr. *F. J. Wood* appeared for the trustees, but took no part in the argument.

Mr. *Bacon*, in reply.

During the lifetime of the testator the money was never at home, because the trustees were at any time entitled to call in the money.

Judgment. The VICE-CHANCELLOR :—

The argument of the trustees of the testator's will is to some extent justified by the language of the settlement.

(a) 12 Beav. 552.

(b) 10 Hare, 126.

(c) 3 P. Wms. 211.

(d) 3 Br. C. C. 19.

(e) 2 Keen, 99.

(f) 1 H. Lds. Ca. 43.

(g) 1 P. Wms. 483.

It might be that the time had not arrived when the testator would be required by the trustees to perform his covenant. But the answer is, that the testator himself put a construction on the settlement; he raised the money and placed it in the hands of the trustees with a trust impressed upon it, and they can only hold it on that trust.

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At the date of his will the testator knew that the only interest he had in the sum of 10,000*l.* was on the failure of the primary object of the settlement, and that in the event of his daughter's death without issue and unmarried, the trust monies would form a part of his personal estate. Knowing this he gave the whole of his personal estate to his wife, and, in order to preserve that personal estate, he directed that his debts should be discharged out of his real estate. There was nothing at all executory. The money had been actually raised and placed in the hands of the trustees.

It has been said that even supposing that part of the fund which still remains in the hands of the trustees should be treated as personal estate, at all events as to those sums which had been borrowed by the testator from the trustees, a different rule must prevail. I do not think this distinction can be maintained. Both portions of the fund were impressed with a trust, which had been actually created. The testator himself had said that his real estate must bear all his debts. On the whole, therefore, the plaintiff is entitled to a declaration that the sum of 10,000*l.* forms part of the testator's personal estate.

1856.

July 12th &
1856.

EDWARDS-WOOD v. MARJORIBANKS.

(As a bill by a purchaser for specific performance with statement, of a contract for the sale of an advowson mortgaged to Queen Anne's Bounty, to secure the cost of rebuilding the rectory house, of which no mention was made in the abstract, the Court decreed specific performance, but without statement.)

A charge for rebuilding the parsonage house in favour of Queen Anne's Bounty, is not an incumbrance which without special stipulation the vendor of an advowson is bound to satisfy—Semble.

ON the 29th of May, 1857, the defendants entered into an agreement with the plaintiffs, which, so far as is material to the question raised between the parties, was in the following terms:—

“Articles of agreement indented, made, and entered into this 29th day of May, 1857, between Edward Marjoribanks, of the Strand, in the county of Middlesex, Esq.; Sir Alexander Cornewall Duff Gordon, Bart.; Hugh Hamilton Lindsay, of Berkeley Square, Esq.; and William Matthew Coulthurst, of the Strand, Esq., called the vendors and trustees of the will of the late Sir Edmund Antrobus, Bart., deceased, of the first part; Sir Edmund Antrobus, of the Strand, Bart., of the second part; and William Edwards-Wood, of Stantell, Warwick, Esq., called the purchaser, of the third part, as follows; that is to say, each of them the said vendors and purchasers, so far as relates to the acts and deeds upon their and his part to be performed, hereby agrees with the other of them that the vendors, at the request and by the direction of the said Edmund Antrobus, party hereto, hereby agree to sell, and the purchaser hereby agrees to purchase the advowson of and to the rectory and parish church of Haseley, in the county of Warwick, at and for the sum of 2800*l.*, subject to the stipulations hereinafter contained:—

“1. That the sum of 2800*l.*, the said purchase-money, shall be paid on the 24th day of June next, at the office of Farrer, Ouvry & Farrer, No. 66, Lincoln's Inn Fields, London, the vendors' solicitors, at which time and place the purchase is to be completed; but if from any cause whatever the said purchase shall not be then completed, the purchaser shall pay interest on the purchase-money at the rate of 5*l.* per cent. per annum until completion; but

this provision is to be without prejudice to the right reserved to the vendors by the last of these stipulations.

"2. That the vendors will within fourteen days from the date hereof, at their own expense, deliver an abstract of title to the said advowson to the purchaser, subject nevertheless to the stipulations hereinafter contained; and within twenty-one days after the actual delivery of such abstract, all objections and requisitions in respect of the title as deduced thereby shall be delivered in writing at the said office of the said Messrs. Farrer, Ouvry & Farrer, and the title shall be considered as finally accepted at the expiration of such twenty-one days, except as to such objections and requisitions as shall be delivered within that time; and if any objections and requisitions shall be made which the vendors are unable or unwilling to comply with, the vendors may, notwithstanding any treaty or discussion in reference thereto, or any attempt to remove or comply with the same, annul the sale without payment of costs.

"7. If the purchaser shall fail to comply with the above stipulations, or any of them, the vendors shall be at full liberty to resell the said advowson either by public auction or private contract, and any deficiency in price on such second sale, together with all expenses attending the same, shall immediately after such sale be made good to the vendors by the present purchaser; and in case of nonpayment, shall be recoverable by the vendors as and for liquidated damages."

An abstract of the defendant's title was delivered and the title accepted. The abstract made no mention of a charge of 696*l.*, of which about 600*l.* was then subsisting due to Queen Anne's Bounty, which had been expended in the erection of a parsonage-house. The following correspondence then passed between the solicitors of the parties:—

"Daventry, 30th December, 1857.

"Dear Sir,—On inquiry at the Bounty Office to ascertain

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whether there was any mortgage upon this rectory, I find there is one existing for 696*l.*, in which Sir Edmund Antrobus joined, four instalments only of which have at present been paid, leaving a balance of upwards of 600*l.* still due upon it. You will agree with me, I believe, that the purchaser is entitled to some compensation for this, as the income of the incumbent will be seriously affected for many years, and the next presentation Mr. Edwards-Wood intends to dispose of, consequently decreased in value. Will you consider what compensation should be made under the circumstances as speedily as is convenient to you, and if it approaches at all what is fair and equitable, I shall advise my client to accept it.

“ Yours faithfully,

“ E. E. BURTON.

“ Messrs. Farrer, Ouvry & Farrer,
 “ 66, Lincoln’s Inn Fields, London.”

Messrs. Farrer, on behalf of the defendant, returned the following reply:—

“ 66, Lincoln’s Inn Fields, London, W.C.

“ 1st January, 1858.

“ *Haseley.*

“ Dear Sirs,—We should agree with you if we had made any representation of value or income; but the fact is, Mr. Edwards-Wood made his own inquiries and founded his offer upon them. We have no doubt you will find on inquiry of Mr. Edwards-Wood, that he was aware of the mortgage in question. We did not know of it.

“ Yours truly,

“ FARRER, OUVRY & FARRER.

“ Messrs. Burton & Son,
 “ Daventry.”

“Daventry, 7th January, 1858.

“*Haseley Advowson.*

“Dear Sirs,—I have this morning heard from Mr. Edwards-Wood, who states that his knowledge of the rectory was solely derived from the sale particulars of 1842, and that he never knew of the mortgage or had any suspicion of it until after the contract was made, Sir Edmund having told him that he had given Mr. Haddow 100*l.* for the improvement of the rectory; and Sir Edmund had probably altogether forgotten that this was in aid of the mortgage in which Sir Edmund seemed to have joined, and which ought to have been, as you will agree with me, on the abstract. Mr. Haddow has now informed him of the particulars of it, and except as to four instalments it appears to be still unpaid. I think it quite clear that the purchaser is entitled to an abatement, and I do not think Sir Edmund will, under the circumstances, object to make one. The mode of calculation will be the value of the life of the incumbent, deducting it from the mortgage and abating the balance, whatever it may be, from the purchase-money. This, of course, must be done by an actuary, at least I am not myself capable of making a valuation. Perhaps the better plan will be to state a case between us of the facts, and then submit them to a competent person.

“Yours faithfully,

“E. S. BURTON.

“Messrs. Farrer, Ouvry & Farrer,

“66, Lincoln’s Inn Fields, W.C.”

“66, Lincoln’s Inn Fields, W.C.

“8th January, 1858.

“*Haseley.*

“Dear Sirs,—We feel a difficulty in advising the trustees to accept your suggestion as to an actuary’s valuation,

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because we feel the advowson is not substantially affected in value by the fact of the mortgage, though it may to some extent depreciate the sale of the next presentation. Under the circumstances, perhaps the better way will be to cancel the contract.

“Yours truly,

“FARRER, OUVRY & FARRER.

“E. S. Burton, Daventry.”

The plaintiff, through his solicitor, having declined to cancel the contract, the defendant's solicitors addressed to Mr. Burton the following notice:—

“66, Lincoln's Inn Fields, London.

“15th of January, 1858.

“Sir E. Antrobus's trustees to Mr. Edwards-Wood.

“Dear Sir,—We cannot advise Sir Edmund Antrobus's trustees to make compensation. We have no power to compel the incumbent to pay off the mortgage, and it therefore becomes our duty to say that we are unable to comply with the objection you have made, and in accordance with the second clause in the contract, we hereby on behalf of the vendors annul the sale.”

The plaintiff shortly afterwards filed this bill, praying, “that the defendants may be ordered specifically to perform the said contract or agreement for the sale of the said advowson and rectory to the plaintiff, and inasmuch as the plaintiff is satisfied with their title thereto, that defendants may be ordered either to pay off or otherwise satisfy the said mortgage or charge on the said advowson or rectory, or that a pecuniary compensation may be made to plaintiff in respect of such mortgage or charge either by an abatement of the purchase-money or otherwise as this Honourable Court shall think fit.

"Secondly, that the defendant may pay the costs of the suit."

Mr. *Malins*, and Mr. *Schomberg*, appeared for the plaintiff.

There is no question of title which the purchaser has in fact accepted; but simply, whether the vendor on one hand is bound to satisfy the incumbrance on the property, or at all events to allow an abatement from the purchase-money, or whether the purchase was subject to the charge. Under ordinary circumstances it is well settled that the vendor is bound to convey the estate free from incumbrance, and there is nothing here to take this case out of the ordinary rule.

In *Milligan v. Cooke* (a), which was nearly this case, the Court decreed specific performance on the bill of the purchaser, with compensation for a defect of title, to be ascertained by reduction of the purchase-money if not at the plaintiff's option, with an indemnity. The vendor in that case, as here insisted on by the purchaser, claimed a right to rescind the contract.

In *Nelthorpe v. Holgate* (b), where there was a stipulation, that if on reference to a conveyancer it should appear that a good title could not be made, the contract should be rescinded, and it appearing that with the vendor's knowledge the estate was subject to the interest of a tenant for life, who refused to join in the conveyance, the Court held that the vendor could not rescind the contract, but decreed specific performance with compensation.

Mr. *Bacon*, and Mr. *Hobhouse*, for the defendant.

In the first place, it is reasonably plain that the purchaser was aware of this charge, and cannot complain of being misled. Secondly, this is not a charge in the ordinary sense, for if there is the charge on the advowson, there is

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Argument.

(a) 16 Ves. 1.

(b) 1 Coll. 203.

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 —
Judgment.

more than the equivalent in the shape of the new house. Thirdly, if it is an objection at all, it is an objection to the title, and the defendant had a right to rescind the contract.

Burnell v. Brown (a) was cited.

The VICE-CHANCELLOR:—

The contract is for the sale of an advowson. It is not disputed that the whole subject-matter of the contract can be put in the possession and enjoyment of the purchaser; but it is said there is an incumbrance, although not upon the advowson. If it was an incumbrance upon the advowson, there would be no question of the right to have that incumbrance discharged, for the contract was for the advowson, which could not be performed by giving to the purchaser the advowson, subject to a charge; for that would be giving him less than he had agreed to buy. The argument for the plaintiff rests principally upon the deterioration in value of the thing which has been purchased. But it is very doubtful, whether, in fact, there is any deterioration. Even if the value was deteriorated, the rule of this Court is well settled, that, if there be active misrepresentation, or if there be studied concealment as to anything that affects the value of the thing bought, then either the purchaser may get rid of the contract altogether, or he may insist upon some adequate compensation. If the claim be in respect of such matter as a right of sporting, upon which no certain value can be placed, and for which therefore no certain compensation can be awarded, it would be a reason for rescinding the contract altogether. Here there has been no misrepresentation, no studied concealment; and it is one of those cases, therefore, within the law as laid down in the last (13th) edition of Lord St. Leonards' Treatise (b). "Although the purchaser might, with proper precaution, have discovered the defect, yet

(a) 1 Jac. & W. 168.

(b) V. & P. p. 279, par. 23.

if, during the treaty, the vendor industriously conceal it, equity will not assist him." Then he puts the case of an estate being represented of the clear net value of 90*l.* per annum; "but there was an industrious concealment of the necessary repair of a wall." On account of that industrious concealment the bill was dismissed, but without costs. That was a bill by the vendor, who had been privy to the industrious concealment. The last sentence of the paragraph is thus: "In the absence of warranty or active deceit, the rule *caveat emptor* applies. In the case of a house, for example, he must himself ascertain whether it is in a safe condition for habitation." If the enjoyment of the benefice and of the advowson depended, in the estimation of this purchaser, upon what the actual income of the owner of the benefice was, he would have ample means of inquiry; and upon the very same principle of constructive notice, which holds that if a man has notice that the land he is buying is under a lease, although he actually knows nothing of the covenants of the lease, he is held bound to know them all, and it must be held that if this gentleman considered it was of importance for him to know exactly the amount which was received by the incumbent, he should have inquired.

The case is new, and the circumstances are peculiar. But I cannot satisfy my mind that it is a case in which there is any right to compensation at all; and therefore I think the decree must be for specific performance without compensation. The plaintiff must pay the costs of the suit; but if the plaintiff will not take the property without compensation, there must be an end to the contract altogether.

This decree was affirmed by the Lords Justices on the 18th of December, 1858, and afterwards (Sess. 1860) by the House of Lords.

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Judgment.

1858.

April 21st.

ANONYMOUS. (a).

By a marriage settlement, a fund belonging to the wife was assigned to trustees for her separate use for life, remainder to the children of the marriage with power of appointment, and in default to her next of kin. On her death without issue and intestate, not having exercised the power of appointment it appearing that she was illegitimate, the husband was held entitled to the fund in his marital right, as all the trusts of the settlement which intercepted the marital right had failed.

BY a marriage settlement, dated the 16th of November, 1850, and executed on the marriage of the plaintiff and his intended wife, to which the plaintiff was a party of the first part, the intended wife of the second, and the trustees of the third part, reciting that a marriage was agreed on, &c., and a debt of 2760*l.*, twenty-eight certificates of Dutch Stock, and 5000*l.* Consols, and a promissory note for 720*l.* 16*s.* 8*d.*, the property of the intended wife, were assigned to the trustees upon trust after the solemnization of the marriage to invest the same, and to stand possessed thereof and of the dividends and annual produce thereof, upon trust during the joint lives of the plaintiff and his wife for the separate use of the wife without power of anticipation; and after the decease of the plaintiff, during the life of his wife upon trust, as to 5000*l.* on trust for the wife, her executors, administrators, and assigns, and as to the residue upon trust for all and every the child or children of the marriage, and in case there should be no child then upon trust for such person or persons as the wife should by deed or will appoint; and in default of such appointment, on trust as to the residue, or as to so much as should remain unappointed, for *such persons* as at the time of the death of the wife should be her next of kin under and according to the statutes made for distribution of intestates' personal estate, and would take and be entitled to the same under the same statutes in case she had died intestate without having ever been married, possessed thereof in such proportions as they, if more than one person, would be respectively entitled thereto in such case according to the said

(a) This case was heard in private.

statutes. But in case the said wife should die in the lifetime of the plaintiff, then that the trustees should raise 5000*l.* and discharge the plaintiff's bond (which by the settlement, he secured by a bond for 10,000*l.*); and as to the residue, upon the same trusts as were declared in case the plaintiff died in the lifetime of his wife.

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The marriage took place in November, 1851. In pursuance of the trusts of the settlement the trustees lent the plaintiff 5000*l.*, for which he executed his bond in the penal sum of 10,000*l.* There were no children of the marriage, and in June, 1856, the plaintiff's wife died intestate without having exercised the power of appointment.

The plaintiff, on the 1st of July, 1857, obtained letters of administration of his wife's estate.

The plaintiff and his wife resided together until her death.

The plaintiff subsequently filed this bill, alleging and proving by affidavit that at the date of the marriage he believed his wife to be legitimate, but that shortly before her death, he ascertained she was illegitimate; and claiming to be entitled to the settled property on the failure, by reason of her illegitimacy, of the ultimate limitation to her next of kin.

It appeared from the evidence of the wife's mother that her marriage took place on the 27th January, 1814, and that the plaintiff, in the November before her death, was forty-six years of age; she was born, therefore, in 1809, being four or five years before the marriage of her parents.

Mr. *Malins* and Mr. *Giffard* appeared for the plaintiff.

Argument.

Mr. *Wigram* and Mr. *Tripp*, for the next of kin of the wife.

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The VICE-CHANCELLOR :—

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By the marriage settlement, this property, which, but for the settlement intercepting the marital right, would have become the property of the husband, was settled upon certain trusts for the husband and wife, and for the children of the marriage, with an ultimate trust in favour of the next of kin of the wife. There were no children of the marriage, and that ulterior trust would have taken effect but for the unfortunate circumstances of the wife's birth. She, it appears, was illegitimate, and consequently had no next of kin, and the ultimate trust which in the events that have happened would have been the only bar to the husband's right having failed, the paramount marital right comes into operation, and the plaintiff is therefore entitled to the fund.

It has been said that the Attorney-General ought to be made a party, (a) and that the reputed brothers and sisters of the wife, who are interested in disputing the husband's title, ought to be before the Court. In my opinion, the plaintiff's right is too clear to require that I should direct this case to stand over in order that these parties may be added. They will not of course be prejudiced by the order. Neither do I see any ground for directing an issue. I shall therefore declare that the plaintiff, the husband, is entitled to the fund, and direct the bond to be given up.

(a) See *Hawkins v. Hawkins*, 7 Sim. 173.

CUDDON *v.* TITE.

THIS was a general demurrer to a bill for specific performance of an agreement for the purchase of the manor of Rickmansworth, dated the 4th of December, 1857.

The bill alleged that the defendant William Percy Dimes, at the date of the agreement now in question, was seised in fee of the manor of Rickmansworth, in the county of Hertford, which was subject to a mortgage in fee to the defendant William Tite. The manor was put up for sale by auction at the City Mart on the 4th of December, 1857, subject to certain printed particulars and conditions of sale. The manor was described as follows:—

“The valuable manor of Richmansworth, otherwise Rickmansworth, in the county of Herts, together with a court leet, court baron, quit rents, fines, heriots, rights, royalties, market-house, market-ground, stallage, and profits and tolls of market, with the right of nominating the occupiers of five alms-houses in Rickmansworth and other the members and appurtenances thereof.

“It is difficult to state the exact annual income of this manor. The fines however are arbitrary, and the heriots the best beast, and failing that the best chattel. At present there are about fifty-nine copyhold tenants of the manor, holding 111 estates, comprising messuages, tenements with curtilages, gardens, and about 300 acres of meadow and pasture land, about 119 heriot; and the annual value of the copyhold property is about 2500*l.* The average income of fines and heriots from 1832 to 1857, inclusive, has been about 188*l.* per annum.”

Together with the particulars and conditions of sale a list of the copyholders of the manor was exhibited, which gave the names and respective ages of the

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May 31st.

The vendor of a manor is entitled to the fines paid for the admission of any new tenants in the room of the tenants described in the particulars of sale who may happen to die after the contract, but before the day fixed for completion of the purchase, although the fines are not in fact paid till after that day. On argument of a demurrer the documents set out in the bill must be taken as therein stated; and no reference to the original document is permitted to contradict the averments in the bill.

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copyholders, and the dates of their admission on the roll, and among other names it contained the name of Thomas Fellowes, who was therein described as of the age of fifty-five years, and the holder of eleven estates under the said manor, being nearly one-eighth in value of the whole. The bill alleged that this list was shown about in the auction by the agents of the vendor, and was inspected and examined by the plaintiff before bidding for the manor, and that he noticed the ages of the tenants with a view to form a rough estimate of the value of the manor with reference to the power of the lord to enfranchise, and the rights of the tenants to require an enfranchisement of the copyholds held of the said manor, and the terms on which enfranchisement might be claimed. By the conditions of sale, it was provided that the purchaser of each lot should immediately after the sale pay a deposit of 15*l.* per cent. on the amount of his purchase-money, into the hands of the auctioneer, and should sign an agreement for the payment of the remainder of his purchase-money on the 4th of February, 1858, at the office of the vendor's solicitors, at which time and place the purchases were to be completed, and from which time the purchasers were to be let into enjoyment of the premises purchased by them respectively, and up to which time all outgoings would be cleared by the vendors. The plaintiff at the said auction was declared to be the purchaser of the said manor at the price of 4700*l.*, and he accordingly paid 750*l.* deposit to the agents of the vendors, and they on behalf of the defendants signed an agreement dated the 4th of December, 1857, for the sale of the said manor by the defendants to the plaintiff for the said sum of 4700*l.*

The bill alleged that the plaintiff had subsequently discovered that the tenant, Thomas Fellowes, died on the 23d of January, 1858, and that the defendant W. P. Dimes on some day prior to the 4th of February, 1858, without the authority of the plaintiff, and without com-

municating with him, caused Mrs. Fellowes and her two sons to be admitted tenants on the court rolls of the said manor to the said eleven copyhold estates of which the said Thomas Fellowes was tenant as aforesaid, and received certain fines on such admittance, as well as the heriots which became due upon the decease of the said Thomas Fellowes. The bill alleged that, by the admittance of Mrs. Fellowes and her sons, the enfranchisement of the copyhold estates to which they were admitted, was for the first time brought within the operation of the Copyhold Enfranchisement Act, of 1852. The sons of Mrs. Fellowes at the date of their admission had recently attained the age of twenty-one years, and according to the tables of the copyhold commissioners with reference to the compulsory enfranchisement of copyholds of inheritance, their lives, together with their mother's, would be considered as equivalent with one life of the age of twenty years. The bill alleged that the plaintiff relied and acted on the said list of copyhold tenants, which gave the ages of the tenants, and was intended to, and in fact did, enable him and other intending purchasers to form their own conclusion with reference to the enfranchising value of the manor, and that the quality and condition of the manor were fixed and determined by the statements made in the particulars of sale, and in the said list; and the bill charged that the plaintiff was entitled to have the manor conveyed to him without any substantial variation from its quality and condition as so determined. The bill alleged that the difference in value in enfranchising the manor caused by the admittance of Mrs. Fellowes and her sons, was at least 750*l*. The bill charged that Mrs. Fellowes and her sons were admitted in great haste, so as to be completed before the 4th of February, 1858, and that the fines were too low, in order to deprive the plaintiff of the fines payable on such admission.

The bill further charged that under the circumstances of the case the said admittance was collusive and fraudu-

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lent as against the plaintiff, and prayed that the said contract of the 4th of December, 1847, might be specifically performed, with an abatement out of the purchase-money of 4700*l.* of a sum for compensation to the plaintiff for the loss of the said fines, and for the substitution and admission of the said Mrs. Fellowes and her sons as tenants of the said eleven copyhold estates, and for the aforesaid alteration in the condition and value of the said manor.

Argument.
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Mr. Bacon and Mr. Valder, for the demurrer, contended that the plaintiff was clearly, on the facts of the case as alleged in the bill, not entitled to relief at the hearing, and therefore the demurrer ought to be allowed without liberty to amend.

Garrick v. Earl Camden (a), *The Earl of Hardwicks v. Lord Sandys* (b), *White v. Cuddon* (c), were cited.

Mr. Malins, and Mr. W. D. Lewis, for the plaintiff.

The facts alleged by the bill must be taken to be true; but if so, the case was that a fraud had been practised on the plaintiff, which clearly entitled him to relief.

At all events, if the plaintiff was not entitled to abatement, he was entitled to have agreement performed.

Legal v. Miller (d), *Woollam v. Hearn* (e), *Higginson v. Clowes* (f), *Stevens v. Guppy* (g), *Lindsay v. Lynch* (h), were cited on the question of parol evidence.

Judgment.
 —

The VICE-CHANCELLOR:—

The right of the plaintiff to recover the fines, it is clear from the authorities, cannot be sustained. It has been

(a) 2 Cox, 231.

(b) 12 M. & W. 761.

(c) 8 Cl. & F. 766.

(d) 2 Ves. sen. 299.

(e) 7 Ves. 211, b.

(f) 15 Ves. 516.

(g) 3 Russ. 171.

(h) 2 Sch. & L. 1.

repeatedly decided, that, if after a contract for the purchase of a manor but before the time fixed for the completion of the purchase, a tenant of the manor dies, the vendor, and not the purchaser, is entitled to the accruing fine, even though the purchaser's may happen to be the hand to receive it. The cases of *Garrick v. Lord Camden* (a), and *The Earl of Hardwicke v. Lord Sandys* (b), are decisive authorities on this point.

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The plaintiff, however, insists that not only was he prejudiced by the loss of the fines, but that an injury had been inflicted on the estate on which they were paid by its being brought within the provisions of the Copyhold Enfranchisement Act of 1852. But if the vendor was entitled to the fines, this other result, however unfortunate and injurious to the purchaser, has arisen from the circumstance that his own calculations upon a matter of mere chance have turned out to be wrong.

It has been urged that this question ought not to be disposed of on demurrer, and that inasmuch as the bill alleges that the plaintiff has relied on and acted on the information supplied to him by the defendants in certain documents at the time of his entering into this contract, the Court is not justified in disposing of the case without the production of these documents.

On the argument on a demurrer, whenever the plaintiff's bill refers to a document and states its contents, tenor, or effect, that statement must for the argument of the demurrer be taken to be accurate; and even in cases where a settlement or a will is set out, and it is attempted at the bar to show by the production of the instrument itself, that it is inaccurately stated in the bill, the Court on demurrer cannot look at the original for

(a) 2 Cox, 231.

(b) 12 M. & W. 761.

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the purpose of contradicting or altering the the averments in the bill, which the defendant by demurring admits to be true.

But it is obvious from the prayer, that the single purpose for which the bill was filed was to obtain an abatement of the purchase-money.

The case of *White v. Cuddon* seems to be the only case precisely applicable to this case, because in all the others the question was as to the terms of the agreement. It is plain that a bill framed for the specific performance of one agreement cannot be sustained for the purpose of enforcing specific performance of another. "The relief," says Lord Redesdale in his Treatise on Pleading (page 41, ed. 5), "must be agreeable to the case made by the bill and not different from it; and the Court will not, in all cases, be so indulgent as to permit a bill framed for one purpose to answer another, especially if the defendant may be surprised or prejudiced. If, therefore, the plaintiff doubts his title to the relief he wishes to pray, the bill may be framed with a double aspect, so that if the Court determine against him in one view of the case it may yet afford him assistance in another."

In this case the only object of the bill is to determine the question as to the right to the fines, as to which the plaintiff's case has entirely failed.

Demurrer allowed with costs.

WAKEFIELD *v.* GIBBON.

1857.

March 28th.

THIS bill was filed by John Wakefield and the other partners in the firm of Wakefield & Co., bankers, to set aside certain deeds as fraudulent and void against the plaintiffs under the statute of Elizabeth.

The plaintiffs were originally simple contract creditors of Major Chambre, to whom in February, 1852, they had advanced 525*l*.

Under the will of Sir Alan Chambre, the defendant Major Chambre was tenant for life of certain estates in Cumberland, Westmoreland, and Yorkshire, with remainder to his eldest son in tail male.

In October, 1852, Major Chambre's eldest son, A. F. H. V. E. Chambre (called for the sake of brevity in the following pages, Henri Chambre), attained twenty-one, soon after which Major Chambre and Henri Chambre barred the entail, and in April, 1853, the father and son sold the Cumberland estates, and in January, 1854, they mortgaged the Westmoreland and Yorkshire estates to the West of England Fire and Life Insurance Company to secure 6000*l*. and interest.

The arrangement, which the bill impeached as fraudulent against the creditors of Major Chambre, was carried into effect by means of four deeds, by the combined operation of which Major Chambre disposed of his life estate in the entailed estates.

The first deed was dated the 25th of April, 1854, between Major Chambre of the first part, George Stansfield of the second part, Henry Gibbon of the third part, and the defendant Henri Chambre of the fourth part. The deed recited that Henri Chambre, with the concurrence of his father, Major Chambre, disentailed the

Bill by the creditors of a tenant for life of real estate impeaching in part a family arrangement, whereby the tenant for life surrendered his interest and assigned certain policies on his own life to his son, in consideration of the son, who was tenant in tail in remainder and also a creditor, paying off certain charges on the life estate and providing an annuity for his mother — Dismissed with costs.

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Cumberland estates; and in order to discharge certain mortgages and charges on his father's life estates, at his father's request, in April, 1852, he concurred in selling the Cumberland estates, and with the proceeds paid off about 9300*l.* of his father's debts, as his father by these presents acknowledged. That he had also concurred in disentailing the Westmoreland and Yorkshire estates and mortgaged them to the West of England Insurance Company for 6000*l.*, and that the whole of such sum had been applied in paying off charges on his father's life estate or created for his father's benefit, which his father, &c., acknowledged. The deed further recited that, beside the mortgage debt of 6000*l.*, the life estate of Major Chambre, in the Westmoreland and Yorkshire estates was subject to a yearly rentcharge of 50*l.* to S. J. W. F. Welch, and also to a mortgage for 500*l.* and interest to one Moore and the defendant Gibbon. That three policies mentioned therein, subject as therein mentioned and held for the father's benefit, and that it had been agreed between Major Chambre and Henri Chambre that, in consideration of the sums raised and applied for the benefit of the father by the sale of the estates in Cumberland and of the mortgage of the Westmoreland and Yorkshire estates, and of exonerating the father from all personal liability to pay the mortgage debt of 6000*l.*, and in consideration of an annuity of 200*l.* covenanted to be paid to Mrs. Chambre by her son in case she survived her husband, the father should make over to Henri Chambre the said policies, subject as aforesaid, and should charge the premiums on his life estate, subject to the existing charges thereon. The indenture then witnessed that the policies, &c., were assigned to Henri Chambre, subject to payment of certain costs, for himself absolutely. By the deed Major Chambre covenanted to pay the premiums and to charge them on his life estate; and Henri Chambre released his father from payment of the 6000*l.*, except as to his life estate. Henri Chambre

then covenanted to pay 200*l.* to his mother in case she survived her husband, to her separate use, and to charge the same on the said hereditaments, &c., &c.

The second deed was dated the 14th of November, 1854, between Major Chambre and Henri Chambre of the first part, and Henry Gibbon of the second, and by which the hereditaments were conveyed to Gibbon on trust for sale, and to hold the proceeds on the trust of an indenture of even date.

The third deed of even date with the above and between the same parties, recited the sale of part of the Westmoreland and Yorkshire estates for 12,621*l.*, and that 1262*l.* 2*s.* had been paid to Major Chambre, and that the residue was conveyed to Gibbon on trust for sale. The indenture then witnessed that the father and son covenanted to pay the balance of the purchase-money, *i.e.*, 11,358*l.* 18*s.* to Gibbon, who was to hold it on trust to invest 1000*l.* for certain purposes and then for the benefit of Henri Chambre; next to pay 3000*l.* to the West of England Insurance Company, in part payment of the mortgage of 6000*l.*; next to pay off the 500*l.* due to Moore and Gibbon; and next to pay 5700*l.* to satisfy the covenants in the marriage settlement of Henri, and as to the residue, after payment of the expenses, for Major Chambre absolutely. It was also declared that Gibbon should stand possessed of 5000*l.* of the purchase-money of the unsold property to secure the annuity of 200*l.* covenanted to be paid by Henri Chambre to his mother, and also to invest 5500*l.* for the benefit of Mrs. Chambre during the joint lives of her and her husband. The deed then provided for payment off of the 3000*l.* mortgage with interest, for payment of 500*l.* to Major Chambre for his expenses in drainage, and then directed the division of the residue between Major Chambre and Henri Chambre equally.

On the 30th of August, 1854, John Wakefield, the plaintiff, purchased a portion of the estates sold for 8430*l.*,

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and in February, 1855, claimed to be allowed to deduct his debt of 590*l.* 12*s.* from the purchase-money, but this was refused; and he therefore brought an action and obtained judgment (by consent), on the 30th of March, 1855. He sued out a writ of *elegit*, but could not enforce it by reason of the above indenture.

The fourth deed impeached was dated the 25th of June, 1855, whereby reciting the deed of the 14th of November, 1854, and that Major Chambre had already received 200*l.* out of the 500*l.* to be paid him for drainage, in consideration of 50*l.* all Major Chambre's interest under that deed was assigned to Henri Chambre absolutely.

In August, 1855, Major Chambre filed his schedule in the Court for the Relief of Insolvent Debtors.

It was admitted there in November, 1854, Major Chambre was insolvent.

In June, 1855, the unsold portions of the estate were offered for sale, and bought in by the trustee for 6000*l.*

The bill charged that the execution of the deeds of April and November, 1854, so far as they provided for the annuity to Mrs. Chambre, and the payment of 5500*l.* and interest, and also of the deed of the 25th of June, 1855, was intended to defeat the creditors of Major Chambre.

The bill prayed for an account, and that the deeds as regarded the annuity and the appropriation of the 5550*l.* might be declared fraudulent and void as against the plaintiff and the other creditors of Major Chambre, and that the defendants Gibbon and Mrs. Chambre, might be declared trustees for the plaintiff; and that the deed of the 25th of June, 1855, might also be declared fraudulent and void as against the plaintiff.

The bill also asked for an injunction and receiver.

The defendant Henri Chambre, by his answer, alleged that Major Chambre was indebted to him to a large amount, and that the deeds of April and November, 1854, were executed at his instance, and for valuable considera-

tion, in order to make a provision for Mrs. Chambre. The answer alleged that when he, Henri Chambre, executed the deeds of November, 1854, he was wholly ignorant of the existence of the plaintiff's claim against his father, or that his father was insolvent, as he believed that the sum of 9300*l.* and 6000*l.* would have been sufficient to pay his debts. The answer denied that the object of the defendants, or any of them, was to elude payment of the debts, or to delay or defeat the creditors of Major Chambre.

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Mr. *Bacon* and Mr. *Wakefield*, for the plaintiff, contended that the whole plan was concerted to defraud the creditors of Major Chambre. There was, in fact, no debt between Major Chambre and Henri Chambre to support the trusts of the deed against the creditors of the father. The son clearly could not have brought an action against the father. This case was almost identical with that of *French v. French* (a).

The following cases were also cited:—*Jenkyn v. Vaughan* (b); *Fitzer v. Fitzer* (c); *Penhall v. Elwin* (d); *Twyne's case* (e); *Russel v. Hammond*, (f); *Colombine v. Penhall* (g).

Mr. *Greene* and Mr. *Leonard* appeared for the trustees.

Mr. *Wigram* and Mr. *Jessell*, for the principal defendants.

Prior to the execution of the deed of April, 1854, the son had a right to call on the father to exonerate the reversionary interest from the mortgage: *Earl of Rosse v. Sterling* (h). By the execution of that deed, the son gave up his right as to the 9300*l.*, and in lieu thereof obtained

(a) 6 De G. M. & G. 95.

(b) 3 Drew. 419.

(c) 2 Atk. 514.

(d) 1 Sm. & G. 258.

(e) 2 Coke, p. 212 of Thomas & Fraser's ed.

(f) 1 Atk. 14.

(g) 1 Sm. & G. 228.

(h) 4 Dow. 442.

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the policies and the annuity for his mother. One distinction between *French v. French* and this case, was that in that case the grant of the annuity was voluntary, but here was obtained for valuable consideration, and payable to the mother.

As to the other deeds of that date, they were also for valuable consideration; and as to the deed of June, 1855, the consideration of 50*l.* was the full value of the interest.

Secondly, this bill only impeached a part of the trusts, but there was no case where the Court had declared a part only of the trusts void.

Campion v. Cotton (a); *Pulvertoft v. Pulvertoft* (b); *Kekewich v. Manning* (c); *Heap v. Tonge* (d); *Davenport v. Bishopp* (e); *Cadogan v. Kennett* (f); *Dewey v. Bayntun* (g), were cited.

Mr. Wakefield, in reply, cited:—*Partridge v. Gopp* (h); *Taylor v. Jones* (i); *Battersbee v. Farrington* (k); *Holloway v. Milord* (l); *Bedford v. Gibson* (m); *Haselinton v. Gill* (n); *Curtis v. Price* (o); *Tarleton v. Liddell* (p).

Judgment.

The VICE-CHANCELLOR:—

The plaintiffs, as creditors of Mr. Alan Chambre, have instituted this suit to set aside the deed of April, 1854, so far as it provides for payment of an annuity of 200*l.* a year to Mrs. Chambre; and also the deed of November, 1854, so far as it appropriates and declares trusts of a sum of 5500*l.* instead of the annuity.

The bill also prays to set aside the deed of the 25th of

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| (a) 17 Ves. 263. | (i) 2 Atk. 600. |
| (b) 18 Ves. 92. | (k) 1 Swanst. 113. |
| (c) 1 De G. M. & G. 176-203. | (l) 1 Mad. 414. |
| (d) 9 Hare, 90. | (m) 9 Mod. 412. |
| (e) 2 Y. & Coll. C.C. 451-468. | (n) 3 T. R. 620. |
| (f) H. Cowp. 432. | (o) 12 Ves. 89. |
| (g) 6 East, 257. | (p) 17 Q. B. 390. |
| (h) Amb. 596. | |

June, 1855, by which just before taking the benefit of the Insolvent Debtors Act, Mr. Alan Chambre sold and assigned all his interest in the surplus monies to arise from the sale of the real estates for the sum of 50*l*. These transactions are said to be a fraud upon the plaintiff and the other creditors, under the statute of Elizabeth. The defendant insists that there was not only no fraud upon the creditors, but that the arrangements made by the deeds were upon sufficient consideration, and entirely fair and *bonâ fide* as between Mr. Alan Chambre and his son the co-defendant.

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Under the will of Mr. Justice Chambre, Mr. Alan Chambre was tenant for life of estates in Cumberland, Westmoreland and Yorkshire, with the remainder to his son, the defendant, in tail. The life-estate of Mr. Alan Chambre was heavily incumbered. Soon after the son came of age the estates were disentailed and the Cumberland estates sold for 9500*l*., which was applied in satisfying mortgages and debts of Mr. Alan Chambre on his life-estate. For the same purpose the son concurred in disentailing the Westmoreland and Yorkshire estates, and mortgaging them for a sum of 6000*l*., the whole of which was applied, with the concurrence of the son, in paying debts and incumbrances of the father. The rental of the whole Westmoreland and Yorkshire estates did not exceed 600*l*. a year. This mortgage of 6000*l*. was paid in January, 1854.

At the date of the deed of the 25th of April, 1854, the life estate was subject not only to the interest in the mortgage, but also to a rentcharge of 50*l*. per annum, and to a mortgage for 500*l*. The father was also entitled to four policies of insurance upon his life for sums amounting to 3999*l*., all of which were subject to a lien of his solicitor for a bill of costs, and some of them to a charge as a collateral security for the sum of 500*l*.

In this state of things, by the deed of the 25th of April,

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1854, the policies of assurance were assigned to the son, subject to an existing charge thereon; and the life estate of the father was charged with the premiums to accrue due for keeping up the insurances; and the son covenanted to pay an annuity of 200*l.* to his mother in case she should survive the father, and the father was exonerated from all liability in respect of the mortgage of 6000*l.*

The considerations received by the father for the arrangement made by the deed were the sums of 9300*l.* and the 6000*l.* raised and applied for his benefit, and the exoneration from all personal liability to pay the 6000*l.* mortgage. The reversionary contingent annuity of 200*l.* per annum secured to the mother by this deed, seeing what her relationship was to both parties, can hardly be treated as any part of the consideration to the father. By the deed of the 14th of November, 1854, the Westmoreland estates had been conveyed to trustees upon trusts for sale; and by a deed of even date, the trusts of the proceeds of the sale were declared to be, amongst other things, to set apart 5500*l.* in satisfaction of the son's covenant to pay the annuity of 200*l.* a year to the mother. This sum of 5500*l.* is directed to be invested in the name of a trustee upon trust to pay the interest to the mother for life for her separate use, and after her death to the father for his life, and after the death of both, the principal sum to be in trust for the son absolutely; out of the remaining proceeds of the sale, 3000*l.* to be paid in part discharge of the 6000*l.* mortgage, and 500*l.* to be paid to the father in respect of monies alleged to have been expended by him in draining the estate.

Previous to the date of these deeds of the 14th of November, 1854, the Yorkshire estates had been sold for 12,621*l.* Of this sum 1262*l.*, the deposit-money at the sale, had been paid to the father. The remainder, amounting to 11,358*l.*, was, by the deed of the 14th of November, 1854, assigned to a trustee, who, on the

completion of the purchase, was to apply 1000*l.* upon trust to answer the rentcharge of 50*l.*, and to pay 3000*l.* and any arrear of interest in respect of the mortgages for 6000*l.* and 500*l.* in satisfaction of the mortgage on the life estate, and to defray the costs of executing the trusts; and any surplus of the 11,358*l.* was to be in trust for the father absolutely. In June, 1855, the father contemplated taking the benefit of the Insolvent Debtors Act. At that time he had received sums to the amount of 200*l.* as payments in advance on account of his interest in the ultimate trust of the surplus under the deed of November, 1854. By the deed of the 25th of June, 1855, the father, in consideration of the 200*l.* previously received, and of the 50*l.* then paid, assigned to the son all his interest in the 500*l.* for the drainage money, and in the whole surplus of the proceeds of the estate.

The object of this suit is not to set aside the complicated arrangement made by this deed wholly, but only as to the reversionary annuity of 200*l.* a year to the mother, and the appropriation of 5500*l.* By the prayer of the bill it is asked that the mother and the trustees of the 5500*l.* may be declared trustees for the benefit of the creditors.

It has been argued that the plaintiffs are entitled to this relief on the authority of the recent decision of the Lord Chancellor in the case of *French v. French*. But there is no reason to think that the Lord Chancellor intended to lay down any new doctrine in that case. He held that where an insolvent trader sold his business and stock in trade, partly in consideration of a contingent annuity payable to his wife, the creditors were entitled to the annuity without disturbing the sale. No doubt there were other circumstances which made it difficult to dispose of that case on so simple a view. The Lord Chancellor, however, did not enter into what appeared to be the difficulties of the case, but decided it on a ground

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which is reconcilable with the acknowledged principles of the Court.

If the father in this case had disposed of the property available for payment of his debts to purchase the reversionary contingent annuity for his wife, it might have been brought within the principle of *French v. French* and the other authorities. But the case is not of that description. In no just view of the transaction can it be shown that any available property of the father was dedicated to the purchase of the annuity. The father was not more a purchaser than the son. Having due regard to the relation in which she stood to both father and son, the covenant by the son to pay the annuity out of his own estate, as a provision for his mother, cannot be dealt with as a transaction in any way in fraud of the creditors of the father, where the son himself was a creditor to so large an amount. Considering the comparatively small value of the estates of which the father was tenant for life, and that he, through his son's concurrence, had received 9300*l.* and 6000*l.*, the rights which the son thereby acquired to stipulate as a creditor for all the provisions under the deeds of April and November, 1854, are fully recognised by unquestionable authority.

In the case of *The Earl of Rosse v. Stirling*, in the House of Lords, where 9000*l.* was borrowed for a father who was tenant for life, and charged upon the inheritance of the son, who had the remainder in fee, Lord Eldon said the consequence generally in equity would be, that the son, joining in a mortgage of the inheritance, would be considered a creditor on the real and personal assets of the father to the amount of the mortgage. To say that in such a case the son is not to be considered as a creditor till the father's death, is a mistake. The right of the son accrued as soon as the inheritance was charged; and where an arrangement is made in the father's lifetime for the sale of the estate, the rights of the son as a creditor are as much available for

any purposes of contract or arrangement, as against the assets of the father after the father's death. Before the execution of the deed of November, 1854, the father had received 1262*l.* part of the purchase-money of the estate, and applied it to his own use. Looking at the circumstances, and the rights of the son, who had assumed such burdens for the relief of his father, it seems impossible to say that he was not entitled to stipulate for the appropriation of the 5500*l.* on the trusts declared by that deed. Whatever discredit may attach to the father as to the circumstances under which he contracted and evaded payment of the debts due by him to the plaintiff or to any other of his creditors, the rights of the son are a sufficient consideration and protection for the arrangement made by the deeds of April and November, 1854.

The remaining part of the case is of very subordinate importance. There is no doubt that the transaction effected by the deed of July, 1855, was entered into in consequence of the father taking the benefit of the Insolvent Debtors Act. Inasmuch as he had before that time received 200*l.* on account of his interest in any ultimate surplus under the trusts of the previous deeds, it appears that the sum of 50*l.* was not an inadequate consideration. The original bill charged, as a reason for setting aside the deed of July, 1855, that the consideration money of 50*l.* never was paid to the father. That allegation is struck out of the amended bill; but there is no offer by the plaintiff to repay the consideration money. It is not an immaterial circumstance that the assignee in the insolvency has not thought it proper to take any proceeding upon his own part to set aside that deed.

Upon the whole, the plaintiffs have failed to show a sufficient case for the interference of the Court, and the bill must therefore be dismissed.

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I have looked carefully to see whether fraud was charged in such a way as to give the defendant, the son, a right to have the costs of the suit; but the case is much too difficult, and the arrangements too complicated, to justify me in directing the costs to be paid by the plaintiff.

November
 18th & 19th.

TINKLER v. THE BOARD OF WORKS FOR THE
 WANDSWORTH DISTRICT.

Where a local Board of Works attempted to exercise their arbitrary powers, without leaving to a person affected thereby the right of appeal given by the Act, the Court restrained them by injunction from so doing until the question should be determined by the proper tribunal.

Where there is a doubt whether the arbitrary powers given to Local Boards are properly exercised, it is the duty of this Court to take care that the checks appointed by the Legislature have due operation in favour of the persons affected.

THE plaintiff in this suit holds, under a lease for lives, a piece of land adjacent to the River Thames, on which he had erected thirty small cottages, called Ford's Buildings.

On the 27th of January, 1857, the plaintiff was served by the defendants, the Board of Works for the Wandsworth District, with a notice in the following terms:—

“Metropolis Local Management Act, 18th & 19th Victoria, chapter 120. The Nuisances Removal and Diseases Prevention Act, 18th & 19th Victoria, chapter 121. The Board of Works for the Wandsworth District: Offices, Bolingbroke House, Wandsworth Common.

“Whereas at a Meeting of the Board of Works of the Wandsworth District, holden on the 24th December, 1856, it was duly made to appear to the said Board of Works, that the houses and premises situate and being as hereinafter mentioned, require certain works to be executed thereto, which are more particularly set forth in the schedule hereunto annexed, and which works are requisite and necessary for the removal and abatement of the nuisances now existing, and which are injurious to the health of the persons dwelling in or near the said houses and premises, and whereas it was duly ordered by

the said Board of Works that notice in writing be given to the owners or occupiers of the said houses and premises, requiring them to do, perform, and execute the works, matters, and things, on or before the day mentioned in the said schedule—I am directed to inform you that unless the said works are commenced on or before the day mentioned in the said schedule, and forthwith completed to the satisfaction of the said Board, compulsory proceedings will be taken under the above-mentioned Acts of Parliament for executing the said works, and for the recovery from you of all costs and expenses incurred thereby. Dated this 27th day of January, 1857. By order of the Board of Works for the Wandsworth District.

(Signed) "SAMUEL STEEL,
" Inspector of Nuisances to the Board of Works
" for the Wandsworth District."

The schedule annexed to this notice is in these terms:—

"Nuisances now existing upon the said houses or premises: cesspools overflowing, and no dust bins. Works required to be done for the removal and abatement of the nuisances: cesspools to be emptied and filled up—drains from privies and sinks constructed—privies to be panned, trapped, and water supply apparatus provided—cisterns to be provided—lime white where necessary—pavements to be made good—dust bins to be provided."

The plaintiff executed some of the works contained in the notice, but declined to convert the privies into water-closets. The defendants thereupon, on the 8th of June, 1857, caused to be served on the plaintiff a notice, which was in the following terms:—

"Metropolis Local Management Act, 18th & 19th Victoria, chapter 120. The Nuisances Removal and Diseases Prevention Act, 18th & 19th Victoria, chapter 121.

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“To Mr. BACON, of Ford's Buildings.

“Notice having been served upon you, by order of the Board of Works for the Wandsworth District, to do certain works upon the premises, situate Ford's Buildings, York Road, in the Parish of Battersea, and the time mentioned in such notice having expired without such works having been completed, the Board of Works for the Wandsworth District hereby give you Notice that their workmen, or the workmen of their contractor, will enter upon the said premises to commence and forthwith execute the said works, on or after the expiration of Seven days from the service hereof, and that the Board will then adopt the course which the law provides for enforcing the payment of all costs and expenses thereby incurred. Notice of your intention to commence these works must be given in writing at least twenty-four hours before commencing.”

In reply to this notice, the plaintiff's solicitors wrote to the defendants to the effect that the plaintiff considered he had done all that the law authorized the defendants to require. The defendants, in reply, insisted on the terms of the notice being complied with, and the plaintiff having failed to comply with their requisitions, on the 7th of November, 1857, they entered on the premises and commenced removing the earth at the back of one of the cottages, and deposited some pans and piping in one of the cottage gardens; and on the 9th of November their workmen commenced the works necessary for converting the privies into waterclosets.

On the 11th of November the plaintiff filed his bill in this Court, praying that the defendants, their agents and servants, might be restrained by the injunction of this Court from entering on the plaintiff's land, or digging on any part thereof, and also from interfering with, pulling down, or converting the said privies into waterclosets, and that the defendants might pay the costs of the suit.

It appeared from the evidence that the board had passed the following resolution :—

Resolved unanimously, “ That it is the opinion of this board, that wherever a sewer exists in the district available for the drainage of houses, the privies or cesspools to which may be complained of, or become a private or public nuisance, waterclosets with all necessary requisites should be constructed.”

It appeared also from the affidavits, that on the 4th of February, 1857, the plaintiff called on the defendants, and stated to them that no nuisance had arisen from the privies to the occupiers of the cottages, who were perfectly satisfied with them, but that if were they converted into waterclosets they would be getting out of order, and would occasion unpleasant smells; and moreover, that there was no sewer into which the drains required could fall. The defendants, by their chairman, stated in reply that it was their intention to do away with all privies whatsoever, and would have none in their district, and that they would construct the necessary sewer.

Mr. *Bacon* and Mr. *Schomberg*, for the plaintiff.

It is clear, that, unless the defendants are legally entitled to compel the plaintiff to convert the privies into waterclosets the plaintiff is entitled to an injunction. But unless the defendants are so entitled under the Metropolis Local Management Act (18 & 19 Vic. c. 120) and the Nuisances Removal and Diseases Prevention Act (18 & 19 Vic. c. 121) or under one of them, they are not legally authorized to do what they have done. It is quite clear that under the Nuisances Removal and Diseases Prevention Act they have no power to enter compulsorily, because such is only given in the event of a neglect to comply with an order of justices, and it was not pretended that any order of justices had been made in this case. The defendants' case must therefore be sustained, if sustained at all, on the Metropolis Local Management Act, and it

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was, in fact, on the 81st and 85th sections of that Act that the defendants mainly relied; but that Act never intended to allow the board to make a general rule instead of deciding on the particular case before them, nor did it intend to supersede the mode of proceeding provided by the second Act.

Mr. *Malins* and Mr. *Speed*, for the defendants.

By the 81st section of the Act (18 & 19 Vic. c. 120) the board are constituted the sole judges of the fact whether the existing or proposed drains, &c., were sufficient for the end to be accomplished, and in case the judgment of the Court were erroneous the Act provided for an appeal in the 211th section. If that were the true construction of the Act, it was quite clear the jurisdiction of this Court was excluded, and the bill must be dismissed.

Secondly, as to the merits, it was quite clear the defendants were only desirous of giving effect to the Act, as they were bound to do.

Judgment.

The VICE-CHANCELLOR:—

The question is, not whether some works ought to be constructed, but whether the particular nature and structure of the works should be such as is insisted on by the defendants, and whether the sanitary purposes may not be effectually answered by the erection of structures of the kind which are alleged by the plaintiff to be sufficient.

It is very much to be regretted that a question of this kind should come before this Court at all. The Legislature, by the 12th section of the second Act of 1855, has provided the proper tribunal for trying questions of this disagreeable kind. Before justices of the peace such questions may, according to the provisions of the Act, be speedily and cheaply tried and decided. There appears nothing to satisfy the mind of any reasonable man that the local board, who are defendants in this case, are justified in

refusing to proceed so as to have the question between them and the plaintiff tried before the justices of the peace, according to the Act of Parliament.

The powers conferred on this and other boards of the same kind are enormous, but they are conferred to enable them to effect purposes in a high degree important to the public benefit. The preservation of the public health was wisely considered by the Legislature of such paramount importance as to justify enactments containing enormous arbitrary powers to be summarily exercised in extraordinary cases. To prevent the abuse of these powers, the second Act, which is mentioned in the title of the defendants' notice, has provided certain checks, by interposing enactments which require the orders of magistrates as authorities of independent tribunals. Assuming that there was in this case such a nuisance as required the intervention of the board, it is not satisfactorily shown that they have proceeded with a proper degree of moderation. It is clear that they have not proceeded so as to give that right of appeal to the justices of the peace, or even that intervention in the first instance of a justice of the peace, which is authorized by the Act.

The proceedings of the defendants, now sought to be restrained, are wholly arbitrary, and have been so conducted by them as to exclude the intervention of any other opinion than their own, and that of their own officers, to guide them in the exercise of those enormous statutory powers which are inconsistent with the ordinary common law right of every Englishman. Being inconsistent with those rights, the notion that the powers are to be exercised so as to deprive the plaintiff of the opinion of a legitimate tribunal seems extraordinary. The 211th section (a) of the

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(a) " Any person who deems himself aggrieved by any order of any vestry or district board in relation to the level of any building, or any order or act of any vestry or district board, in rela-

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first Act, which gives a right of appeal to the Metropolitan Board of Works, cannot be considered as imperative, or as superseding the enactments in the second statute, which give jurisdiction to the justices of the peace as the proper branch of the established magistracy of the country. The Metropolitan Board of Works is a board with great arbitrary powers, for peculiar purposes, of recent legislative creation; and when, in the 211th section, it is stated that appeals may be made to that board, the scope of the Act rather seems to show that the appeal to them was intended for questions of a different kind from that which arises in this case.

But, assuming that the appeal to the Metropolitan Board might have been made on some points in this case, it is not the proper jurisdiction to try the question as to the legality of the defendants' mode of proceeding. It is not reasonable that the defendants should be allowed to proceed in such a manner as to deprive the plaintiff of the means of having his legal rights adjudicated upon by a proper legal tribunal.

Upon the whole, there seems enough proved on the part of the plaintiff to show that he has a right to the inter-

tion to the construction, repairs, alterations, stopping or filling up, or demolition of any building, sewer, drain, watercloset, privy, ashpit, or cesspool, may, within seven days after notice of any such order to the occupier of the premises affected thereby or after such act, appeal to the Metropolitan Board of Works against the same; and all such appeals shall stand referred to the committee appointed by such board for hearing appeals as herein provided, and such committee shall hear and determine all such appeals, and may order any costs of such appeals to be paid to or by the vestry or district board by

or to the party appealing, and may where they see fit award any compensation in respect of any act done by any such vestry or district board in relation to the matters aforesaid; provided, that no such compensation shall be awarded in respect of any such act which may have been done under any of the provisions of this Act on any default to comply with any such order as aforesaid, unless the appeal be lodged within seven days after notice of such order has been given to the occupier of the premises to which the same relates."

vention of a proper legal tribunal to adjudicate on the question between himself and the defendants as to the legality of their proceedings and the nature of the works which must be constructed. It is not consistent with the doctrines of this Court that, when a question of that kind is to be determined, the defendants should be allowed to decide the question in their own favour, and put in force violently those powers conferred by the Act, till that which seems the proper legal tribunal shall have decided that the case is one to justify the exercise of the extraordinary powers.

The order must therefore be, that the defendants by their counsel refusing to proceed under the 12th section of the Act of the 18th and 19th of the Queen, cap. 121, being one of the Acts in the title of the notice in the pleadings mentioned, and refusing to make any arrangement to enable the plaintiff to try the legal validity of their notices and proceedings in the bill mentioned—order for an injunction according to the prayer of the bill until further order, the plaintiff undertaking to proceed without delay to construct at his own expense proper and sufficient works and conveniences on the premises in the bill mentioned, so as not to be objectionable as a nuisance, or liable to removal under any proceeding before a justice or justices of the peace, under the 12th, 13th, and 14th sections of the Act of Parliament 18th and 19th of the Queen, cap. 121; with liberty to either party to apply as they may be advised.

In coming to this conclusion, the importance to the public welfare of the duties to be performed by the defendants has not been overlooked. Considering the importance of the purposes to be effected by these boards, it seems the duty of the Court to discountenance any proceedings tending to baffle or obstruct the legitimate exercise of their powers. But where a fair question arises whether they are legitimately and properly exercising such enormous powers, it would seem to be the duty of the

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Court, where even a doubt arises, to take care that every check which the Legislature has provided has its due operation in favour of the person complaining of the undue exercise of the arbitrary power, unless in some urgent case where imminent danger to the public health would ensue from any delay in the exercise of the arbitrary power.

Another matter not to be overlooked in cases of this kind is, the expensive nature of the litigation and the inequality in that respect of the contending parties. The defendants seem to consider themselves free from all personal risk of costs. Even if they should be wholly unsuccessful, the ordinary penalty of the payment of the costs personally—a penalty calculated materially to check a litigious spirit—does not affect the defendants. If they should at any stage of this litigation be condemned in costs, instead of their being obliged to provide them out of their own private funds, those very costs must be raised by a rate of which the successful plaintiff may have to pay his own proportion. The question of costs, however, is not now to be decided.

ROBERTSON *v.* NORRIS.

1853.

Nov. 9th, 10th,
& 11th.

THIS bill was filed by the representative of Joseph Clinton Robertson, against John Norris, praying to set aside a sale under a power contained in an indenture of mortgage dated the 13th of November, 1840, of two fourth shares in the *Railway Times*. The bill also prayed that it might be declared that no *bonâ fide* sale of such shares had been made to Norris, and that the plaintiff was entitled to redeem, and for an account; and if a balance should be found due from the defendant, for payment. The bill also prayed, in the alternative, that if the Court should be of opinion that such sale was *bonâ fide*, but at an under value, then that the defendant might be charged with the difference and interest thereon. The bill offered in the usual way to pay what, if anything, should be found due from the plaintiff to the defendant.

Under an indenture dated the 15th of June, 1838, John Braithwaite, J. C. Robertson (the mortgagee) deceased, John Whitehead, and John Evans became jointly and equally interested in the *Railway Times*, and the stock and effects, &c. On the 16th of June, 1838, Whitehead and Evans were the registered proprietors, and soon afterwards the partners purchased a lease of 122, Fleet Street, in order to carry on the said newspaper, which they assigned to Norris, the then printer; he by deed of the 8th of November, 1838, agreeing to hold it as their trustee.

By indenture dated 14th of May, 1839, J. C. Robertson, with consent of the other partner, purchased for 500*l* Whitehead's interest in the paper, thus acquiring two fourth shares in the *Railway Times*.

In 1840, J. C. Robertson borrowed from Norris 500*l*, and by an indenture dated the 13th of November in that year, assigned his two fourth shares to Norris, his executors,

Where a mortgagee under an improper exercise of a power of sale contained in his deed, himself became the purchaser of the mortgaged property—on a bill filed fifteen years afterwards, the Court decreed redemption, and ordered the costs of the suit to the hearing to be paid by the mortgagee.

No lapse of time will bar the right to redeem, where relief is sought against the improper and oppressive exercise of a power of sale by the mortgagee—*Semble*.

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administrators, and assigns, to secure such amount. The deed also contained a power of sale in case of default. J. C. Robertson had also accepted a bill of exchange for 500*l.* by way of additional security.

When the bill became due, J. C. Robertson paid 250*l.*, and a receipt of such payment was endorsed on the deed; and it was agreed that J. C. Robertson should accept another bill for 250*l.*, payable three months after date, and that all the covenants in the said indenture should be applicable as if they had been entered into to secure 250*l.* instead of 500*l.* J. C. Robertson paid 100*l.*, but default having been made in payment of the residue, by a deed dated the 11th of June, 1841, John Norris, the defendant, sold the said two fourth shares to his brother, James Norris, in consideration of 1000*l.*, which was not paid, at least at that period. In 1841 James Norris was registered as a proprietor of the newspaper.

In December, 1843, Evans assigned his interest to Braithwaite, and by deed dated 29th of April, 1847, Braithwaite's shares were assigned to the defendant, J. T. Norris.

In 1848, for a nominal consideration, the defendant obtained from James Norris an assignment of the property in the newspaper. On the 23d of September, 1852, J. C. Robertson died, and the plaintiff as his personal representative in 1856 filed this bill.

Argument.
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Mr. *Malins* and Mr. *H. Stevens* contended that the evidence clearly showed a collusive and fraudulent sale under the power, which this Court would set aside. It would be contended that the lapse of time was a bar to the plaintiff's equity; but in case of fraud no length of time was a defence in this Court: *Cotter v. The Earl of Barmore* (a); *Charter v. Trevelyan* (b).

(a) 4 Bro. C. C. 203. See also (b) 11 Cl. & F. 714.
Booth v. Earl of Warrington,
 Ibid. 163.

Mr. *Bacon* and Mr. *Piggott*, for the defendant, submitted that the evidence failed to establish fraud; but even if there were no other objection to the plaintiff's bill, the lapse of time was fatal. The sale took place in 1841, and the bill was not filed till 1856, and to impeach the sale after such a lapse of time would place the defendant in a position of intolerable hardship in which the Court would place no mortgagee. In *Gregory v. Gregory (a)*, a bill to set aside a purchase by a trustee for himself and his children after a lapse of eighteen years, was dismissed upon the length of time only.

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Judgment.

The VICE-CHANCELLOR:—

Judgment.

The plaintiff claims a right to redeem the mortgaged property, notwithstanding the exercise of the power of sale. The defendant's case rests not merely upon his assertion of a complete and irredeemable title to the property, by means of the sale so effected. If he should fail in that part of the case, he insists that the plaintiff comes too late; that the transaction ought to have been questioned at a much earlier period, and that the Court ought not now to interfere with the defendant's right, even if the power of sale were not properly exercised. The case is overloaded with evidence upon a number of minute circumstances, to which, after attending to them, it seems unnecessary to advert in detail, as there are some broad and distinct features in the case sufficiently established, not only by evidence, but by facts admitted on the part of the defendant, to make the first question, whether the defendant has acquired an absolute title under the power of sale, sufficiently clear. The first broad fact is, that the defendant, who was himself mortgagee, appears now insisting upon his right to the estate as owner upon a derivative purchase from the very man to whom he sold.

(a) *Geo. Cooper*, C. C. 201; on appeal, *Jac.* 631.

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 ———
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That is a material circumstance, considering the nature of the infirmity in the exercise of the power of sale which is alleged on the part of the plaintiff. Another striking circumstance is, that the purchaser, through whom the defendant claims, was the brother of the defendant himself. When the question is as to the right to redeem, and the mortgagee says, "I bought the estate of my brother, to whom I sold it under a power of sale, and the right of redemption is lost," it naturally excites surprise, and would require something very strong to relieve the case of that sort of cloud arising from the relation between the parties, to say nothing of the other circumstances. But still that would not be enough to dispose of this case.

What appears upon the evidence is this, that the power of sale was exercised by the mortgagee for other purposes and with other views than the merely recovering payment of the debt.

Lord Eldon, in the case of *Downes v. Glazebrook* (a), and in *Chambers v. Goldwin* (b), and in *Cholmondeley v. Clinton* (c), has stated the principle on which this Court proceeds when the question is as to the validity of a sale effected by a mortgagee under a power of sale. Lord Eldon says that the mortgagee is a trustee for the benefit of the mortgagor in the exercise of that power. That expression is to be understood in this sense, that the power being given to enable him to recover the mortgage money, this Court requires that he shall exercise the power of sale in a provident way, with a due regard to the rights and interests of the mortgagor in the surplus money to be produced by the sale. The legitimate purpose being to secure repayment of his mortgage-money, if he uses the power for another purpose—from any ill motive to effect other purposes of his own, or to serve the purposes of other individuals—the Court considers that to be a fraud in the

(a) 3 Mer. 200.

(b) 9 Ves. 271.

(c) 2 Jac. & W. 1—80.

exercise of the power, because it is using the power for purposes foreign to that for which it was intended. It is not disguised in this case—it is beyond all doubt—that the defendant was goaded on by other persons, for purposes of their own, to exercise this power of sale as a means of expelling the plaintiff from that share in the property which was the subject of the mortgage. That alone, if well established, is enough to vitiate this sale. If the Court finds that the power given for a particular and specified purpose is avowedly used to effect another purpose, that, I apprehend, would be fatal to the title conferred on the alleged purchaser. But the case does not end there. So far from there being a sale to a purchaser who pays his money and enters into possession, the immediate consequence of the sale is, not, that the purchaser enters into possession and enjoyment of the property, but that the vendor, the mortgagee with the power of sale, appears in the active possession and enjoyment of the property, and he accounts for that by saying that he is in possession only as agent for the person to whom he sold. The facts are too glaring to be covered by this excuse.

The argument mainly relied upon for the defendant is, that there have been such acts on the part of the plaintiff, or his testator, who was the original mortgagor, that by length of time or acquiescence it must be considered that the right to relief, if it ever existed, has been lost. Some attempt was made to show there had not only been acquiescence, but acts amounting to a confirmation of the purchase. The strongest circumstance as to confirmation is the letter of Mr. White, in which he says, “I am disposed, under existing circumstances, to recognise the sale to James Norris.” But that letter was written by Mr. White, who was then acting as solicitor for the plaintiff’s testator, at a time when it was proposed to file a bill to set aside the sale. Looking at the existing

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circumstances, it amounts to no confirmation at all. From the moment of the sale, which was strongly resisted, the history of the transactions between those parties, so far from showing any acquiescence, shows a constant iteration of attempts to get relief against what was considered oppressive conduct. These were not very fortunate attempts, nor does there seem to have been a very accurate apprehension of the case of the mortgagor. The length of time, from 1841 to 1856, is no material objection to the plaintiff's right to relief. Even if it were a much longer time, it would be no bar to the right to redeem, where relief is sought against the improper and oppressive exercise of a power of sale by a mortgagee.

The decree must therefore declare that the sale and assignment to James Norris, by the deed of June, 1841, purporting to be made in pursuance of the power of sale in the indenture of mortgage, is invalid, and that the plaintiff is entitled to redeem; and then direct the necessary accounts. There will be an account of what remains due for principal money and interest, and an account of all the profits received from the property included in the mortgage, which have come to the hands of the defendant, or which, but for his wilful neglect or default, he might have received; and on that footing decree redemption on repayment of the excess; if the profits do not amount to what shall be found due for principal money and interest, the balance must be paid; if it appears, on the other hand, as the plaintiff alleges, that there is a large balance in hand, that must be taken into account; the plaintiff to have his costs up to the hearing.

The decree was as follows:—

1. An account of what is due to the defendant for principal and interest under the said mortgage deed dated the 13th day of November, 1840. And upon the plaintiff paying to the defendant what shall be certified to be due to

him as aforesaid, within six calendar months after the chief clerk of the judge to whose court this cause is attached shall have made his certificate at such time and place as shall be thereby appointed, it is ordered that the defendant John Thomas Norris do assign to the plaintiff all the share and interest of the said Joseph Clinton Robertson, deceased, of and in the said newspaper. And the plaintiff is to be at liberty, as soon as the chief clerk shall have made such certificate, to apply to the Court as to the payment of the amount thereby certified, and as to such assignment, and as to possession of the said shares, as he may be advised.

2. An account of all sums received by the defendant, or any other person or persons by his order, or for his use, or which, but for his wilful neglect or default, might have been received in respect of the proceeds of the said newspaper, from the 11th day of June, 1841, the date of the said assignment, and of all payments in respect thereof. And it is ordered that one moiety of the net profits, if any, be ascertained, and in taking such account, regard is to be had to any debts or debt other than the said mortgage debt, which shall be found due from the said Joseph Clinton Robertson to the defendant; and in taking the accounts hereby directed, all just allowances are to be made. And it is ordered that the defendant John Thomas Norris do pay to the plaintiff, Archibald Robertson, his costs of this suit up to the hearing. Adjourn further consideration. Liberty to apply, &c. &c.

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1859.

Nov. 18th &
19th.

Where a mortgagee of a newspaper by an improper exercise of a power of sale, entered into possession as purchaser, and printed the paper, receiving the profits and providing the necessary funds—the Court having set aside the purchase, refused to allow him to charge credit prices for printing, even though on the mortgage account a balance might be found due to him.

A motion to obtain the opinion of the Court as to the principle on which the account ought to be taken for the guidance of the chief clerk, is not irregular—*Semble*.

ROBERTSON v. NORRIS. (a)

THIS was a motion substantially for the purpose of obtaining from the Court a direction, that in taking the accounts ordered by the decree in the cause to be taken, the chief clerk should not allow to the defendant a credit scale of prices for printing, &c. the *Railway Times*.

In 1837, a Mr. Robertson with a Mr. Braithwaite, and two other persons, projected, and were the proprietors of the *Railway Times*.

From May, 1838, until the 11th of June, 1841, the defendant J. T. Norris printed the *Railway Times*, and supplied the necessary paper and stamps to Mr. C. Robertson at a scale of prices about the same as those which he now claimed to be allowed. In 1840, Robertson borrowed from the defendant J. T. Norris 500*l.*, and afterwards 200*l.*, on an assignment of his share in the paper, the deed containing a power of sale. In June, 1841, the defendant J. T. Norris claimed from the proprietors of the newspaper the sum of 2201*l.* 11*s.* 9*d.*, for which Robertson had given bills of exchange, and on the 11th of June, 1841, he exercised the power of sale in the mortgage deed, and sold or affected to sell Robertson's share in the property to his brother James Norris for the sum of 1000*l.* From that time until the 22d of March, 1845, J. T. Norris continued to print and manage the paper, and received all the proceeds; but at length the other partner, Braithwaite, who had been for some time dissatisfied with the course that had been pursued, and with the failure to realise any profits, insisted on having the proceeds paid into the London and Westminster Bank. From that time the property seemed to have become so profitable, that between that date and the 29th of April, 1847, the partners divided about 8000*l.*

(a) See preceding case.

On the 4th of July, 1846, Braithwaite filed a bill against J. T. Norris and James Norris for an account, and also alleging that Mr. Robertson was primarily liable for the claim. The bill also averred that from the 11th of June, 1841, to the 31st of March, 1845, the defendant John Thomas Norris received the whole of the proceeds and profits of the newspaper, and that such proceeds and profits, after paying all the charges and outgoings of the said newspaper, and of conducting, printing, and publishing the same, the moiety of the defendants James Norris and John T. Norris had been more than sufficient to discharge all the debts due to the said J. T. Norris from the partnership carried on by Robertson, Braithwaite, and Evans, and the moiety of the plaintiff in the said 1000*l*.

The bill alleged that the plaintiff repeatedly requested the said John Thomas Norris to furnish an account of the receipts, outlay, and expenses of the said defendant J. T. Norris in respect of the said newspaper from the 11th of June, 1841, and that the said J. T. Norris frequently promised to furnish the plaintiff with such account; but on various pretexts he delayed doing so until the 22d of February, 1845, when the said John Thomas Norris delivered to the plaintiff an account purporting to be an account of the receipts, outlay, charges, and payments of the said defendant John Thomas Norris in respect of the said newspaper from the 12th of June, 1841, to the 28th of December, 1844, inclusive; and by such account it appeared that the said defendant John Thomas Norris received on account of the sale of copies of the said newspaper, and for advertising therein, 12,807*l*. 3*s*. 11*d*., and that he claimed 12,690*l*. 3*s*. 10*d*., as due to him for paper, stationery, printing, stamps, and outgoings supplied and paid by him respectively on account of the said newspaper, leaving a balance of profit in favour of the proprietors of the newspaper of 117*l*. 18*s*. 1*d*., only.

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—
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That the said account is an unfair account, and that the charges therein for paper, stationery, and printing, are excessive overcharges, and exceed by nearly one-third what would be fair charges, and that such overcharges amount altogether to more than 3000*l*. That the plaintiff remonstrated with the defendant against such account, and a negotiation took place, &c. That on the 31st of March, 1845, the plaintiff caused a notice in writing to be served on the publisher of the paper not to pay the monies to the defendant J. T. Norris, &c. &c.

The bill prayed, *inter alia*, that it might be declared that the debt due to the said defendant J. T. Norris from the partnership, became extinguished in equity by the purchase of the share of the said J. C. Robertson in the said partnership by the said J. T. Norris, or at least that the proceeds and property of the said shares became liable to answer and pay the said debt; that the said J. T. Norris might be restrained from prosecuting any action on the said bills of exchange; that it might be referred to the Master to inquire and report, whether the charges for paper, stationery, and printing made by the defendant, were proper charges, and whether the same ought not to be reduced to some and what extent or amount; and that it might be referred to the said Master to take an account of the paper and printing supplied and executed by the defendant J. T. Norris since the 28th of December, 1844, and to inquire and report what were proper charges for the same.

The suit was eventually compromised, and on the 29th of April, 1847, the following agreement was entered into as set forth in paragraph 16 of the answer of the defendant J. T. Norris to the present suit.

“ The suits now pending between Mr. John Braithwaite, Mr. James Norris, and Mr. John Thomas Norris to terminate, and all existing partnerships in respect of the

Railway Times to be dissolved. Mr. John Thomas Norris to be paid the sum of 400*l.* from the funds in the London and Westminster Bank by four quarterly payments of 100*l.* each, that is to say, one cheque dated the 30th of April, 1847, one dated the 30th of July, one dated the 30th of October, and one dated the 30th of January, 1848, in satisfaction of his claims for printing, stationery, and stamps, and all other claims upon the proprietary. The residue of the money at the London and Westminster Bank, the book debts, stock, fixtures, and lease of premises to be equally divided between Mr. Braithwaite and Mr. John Thomas Norris. Cheques to be drawn immediately in favour of each for the sum of 1500*l.* The costs of the suit and negotiations for settlement to be defrayed by each party on their own account. Mr. John Thomas Norris to purchase or otherwise arrange with his brother for the transfer of his half of the *Railway Times* to himself. Mr. Braithwaite, Mr. James Norris, and Mr. John Thomas Norris to execute mutual releases for all matters up to the present time. A new partnership to be formed between Mr. Braithwaite and Mr. John Thomas Norris, as proprietors and co-partners in the *Railway Times*. A proper partnership deed to be prepared, with common newspaper partnership provisions, and in case of disagreement between the parties as to any such provisions, the same to be settled and defined by a conveyancer, to be mutually named by Mr. Shapter and Mr. Piggott.

“ As witness our hands,

“ JNO. BRAITHWAITE,

“ J. T. NORRIS.”

The deed by which J. T. Norris, in pursuance of the agreement, became the owner of the property, was not executed until 1848, for a nominal consideration. Cox & Wyman continued to print the paper until the 20th of July, 1850, when J. T. Norris purchased Braithwaite's

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share, and from thenceforth printed the paper until the date of the decree. On the 23rd of June, 1856, the representatives of J. C. Robertson filed a bill, praying for a declaration that either there was no *bonâ fide* sale of Robertson's share, or that it was at an under price, and praying for the consequent relief. The cause was heard on the 9th and 10th of November, when the Court declared the sale invalid.

Before the Chief Clerk the defendant brought in a claim that he was entitled in taking the account to be allowed a scale of credit prices for printing the newspaper, on the ground that, though he was in receipt of the proceeds, yet, that as agent of Robertson, he was not entitled to appropriate his share of such profits in liquidation of the debt of 2201*l.* 9*s.* 5*d.*, alleged to be due to him from Robertson's estate.

There were several affidavits filed on both sides, the general result of which seemed to be that as credit prices the defendant's charges were not unreasonable; but that they were very much higher than cash prices, or than the charges of Messrs. Cox & Wyman for printing the same paper.

There was evidence to show that part of the bill of 2201*l.* 9*s.* 5*d.* was for printing another periodical in which Robertson was interested, but in which, so far as the evidence went, his partners had no interest.

Besides claiming the higher scale of prices, the defendant J. T. Norris also claimed upwards of 600*l.* interest on the said debt of 2201*l.* 9*s.* 5*d.*

Argument.
 —

Mr. *Malins* and Mr. *H. Stevens*, for the plaintiff.

The object of this application is to obtain from the Court a declaration of opinion for the guidance of the Chief Clerk in taking the accounts.

Mr. *Bacon* and Mr. *Piggott*, for the defendant J. T.

Norris, objected that it was not the practice of the Court, on motion, to deliver an opinion instead of making an order.

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 Argument.

[The VICE-CHANCELLOR. — The objection cannot be sustained. In *Twyford v. Trail* (a), Lord Cottenham, even under the old practice, pending the inquiry before the Master, sanctioned an application to the Court for its opinion to guide the Master as to the principle on which he should proceed.]

Mr. *Malins*.—The question, then, is whether the defendant, having been in the receipt of the weekly proceeds, is now at liberty to charge credit prices, even supposing his alleged debt were due.

But his alleged debt could not be supported. The evidence showed that his charges for printing and publishing were exorbitant until the time when the proceeds were deposited in the bank; but no sooner was that arrangement made than the profits were considerable. Braithwaite never acquiesced in this scale of charges, and filed a bill impeaching them, the result of which was that the defendant compromised the alleged debt for 400*l*.

The decree established that, instead of being joint owner of the property, the defendant was mortgagee in possession, and as such could make a profit out of the property.

Mr. *Bacon* and Mr. *Piggott*, for J. T. Norris.

The scale of charges were those sanctioned by Robertson himself, and the plaintiff could not now be heard to say that that was improper.

The debt due from Robertson was 2200*l*., and was not affected by the suit filed by Braithwaite. The allegation by Braithwaite was that Robertson was bound to indemnify him against Norris's claim. The compromise, therefore,

(a) 3 M. & C. 650.

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—
Argument.

between Norris and Braithwaite embraced merely Norris's claim against Braithwaite himself.

If, then, there was due to J. T. Norris the sum of 2200*l.*, it followed he was entitled to satisfy that claim before applying the proceeds in discharge of the weekly bills.

Mr. Malins was not called on to reply.

Judgment.
—

The VICE-CHANCELLOR:—

I am satisfied that in taking this account *Mr. Norris* is not entitled, as against *Mr. Robertson*, to have credit for the printing at any other than cash prices. The first part of the argument on behalf of *Mr. Norris*, to show a right to charge not cash prices but credit prices, is founded upon what has taken place as to his remuneration as printer up to the year 1841, when the plaintiff, *Robertson*, was ousted as a partner. It was argued that up to the time of *Robertson's* exclusion, *Robertson* had sanctioned a remuneration for printing on the scale of credit prices. Assuming that *Robertson* sanctioned credit prices as between the proprietors of the paper and *Norris* up to the year 1841, what is now to be decided is, whether all the printing executed subsequently to 1841 by *Norris* is to be on the scale of remuneration sanctioned by *Robertson* up to 1841. I cannot see that the circumstance of a particular scale having been agreed to by *Robertson* up to 1841 can have any material influence upon the question the Court has to decide; because the printing after 1841, must be executed upon a contract by somebody; and what is perfectly clear is, that whoever was the employer after 1841, the contract made with the printer after 1841 was not a contract by *Robertson*. It appears that the state of things was this:—*Norris*, the printer, was the manager of the paper. He was printing the paper and managing it. He had the cash produced by

the sale of the paper ; that is to say, he was receiving the funds out of which the printing and other expenses of the paper were paid. Then, was anything done between Braithwaite and Robertson with reference to a sanction of credit prices which can authorize Norris to say that, upon a contract with the proprietary of the paper, he is entitled to be paid upon credit prices, and not upon cash prices ?

It is in evidence that Braithwaite, up to the time of his ceasing to be a co-proprietor of the paper, had never sanctioned a contract for credit prices at all. So far from it, being dissatisfied with the system of the management of the paper by Norris, who was receiving all the cash in respect of the paper, he filed a bill against Norris ; and part of the prayer of that bill was, that Norris might be restrained from suing upon bills drawn upon the proprietors of the paper, and accepted by Robertson on behalf of the partners, and which bills are stated to have been accepted in part payment of the account delivered, in which there is a balance consisting of 2201*l.*, and which account was on the scale of credit prices. Braithwaite's case was that of a man who was quarrelling with the printer, Norris, as to the rate of remuneration. But his case as to the charges before 1841 is not now in question. It was insisted that Robertson received money enough from the produce of the sale of the paper to discharge what was due to Norris, and therefore that, as against Braithwaite, these bills are not to be treated as an existing charge. But by a memorandum dated in April, 1847, Braithwaite, who is clearly a continuing partner, capable of binding or releasing the partnership, made a contract with Norris, in which there is no reference to Braithwaite's debt. This was not an agreement by which Braithwaite was to pay one-half of 2201*l.*, or one-half of 1000*l.*, but an agreement by which he was to draw cheques to the amount of 400*l.* ; and by a document in writing, set forth by Norris in his answer, Norris accepts that sum of 400*l.* *in satisfac-*

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 ———
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tion of all demands against the proprietary in respect of the printing charges. (a) If that be the state of things as between Braithwaite and Norris, it seems perfectly plain that the effect of what was done prior to 1841, cannot establish any case to entitle Norris, during the time he has excluded Robertson, to charge against Robertson any other terms than those he agreed upon as for the whole proprietary with Braithwaite.

Then the next question is, whether there is any principle on which the Court can direct that credit prices should be allowed to Norris as partner, during the period of printing, when Braithwaite, the existing partner, had entered into no contract whatever with anybody on that scale. Norris, by the decree of the Court, has been ousted from his right to be treated as a partner in this concern. He had in 1841, by a bargain which the Court has thought an unjust bargain and declared to be invalid, bought Robertson's share. He then stood apparently as Braithwaite's partner. But the Court has annulled that bargain; and by a decree of the Court, Norris is placed in the situation of being bound to account for all that he has received in respect of the paper; but at the same time he is entitled to be allowed all that he has paid on account of the paper. It appears that Norris at best was only in possession as mortgagee. The terms of the decree show that Norris, who was in possession under an invalid contract to buy what was only pledged to him, is only to be treated as a mortgagee in possession.

But a mortgagee in possession, according to the doctrine of this Court, is not merely to account for all he has received, but he is dealt with in a severe way; and I have to look at Norris, as a man in possession of the property of the paper from 1841 up to the date of the decree, improperly acting as a proprietor, and in so doing, a trespasser and a wrong-doer. That, however, is independently of his character as mortgagee. If a man, by

(a) See *antè*, page 421.

trespass and wrongful conduct, enter into possession of the property of another man, he is dealt with more severely than a mortgagee in possession is dealt with. The principle of the Court has been stated by Lord Hardwicke as to cases where there has been a wrongful possession of property. Here the Court has to deal with a man who has obtained possession under an unjust bargain. In *Mitford v. Featherstonhaugh* (a) Lord Hardwicke stated the rule to be that "Where there is extortion and oppression, as in making a mortgage and accumulating interest, the Court often directs in the decree to take everything most strongly against such a person; and rightly." Why does Norris ask to be allowed to charge credit prices? He seeks that the Court should treat him as employing himself as printer for a paper on which he was a trespasser and a wrong-doer, upon the hardest and most expensive terms of being paid credit prices. Moreover, he says he is entitled to be paid credit prices because his payments in respect of the paper were always in advance. Mr. Norris was receiving all the money that was paid for the paper, and assuming that these payments were not all made—assuming that he did not receive his payments in full—still he was not like a man trading upon credit, who is kept waiting an indefinite period for his money. He asks the Court to sanction his being allowed to charge credit prices against the man whom he has thrust out of the partnership, and whom he prevented from making a better bargain with the printer. Moreover, Braithwaite himself, it appears, has been so dissatisfied with the way in which Norris was dealing with the cash he received, that he compelled Mr. Norris to employ another printer; and accordingly Messrs. Cox & Wyman were employed to print the paper. These gentlemen were remunerated upon a proper scale of prices and all that is asked on behalf of Robertson is, that Norris during the time he executed the printing should be remunerated upon the same scale of charges as

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(a) 2 Ves. sen. 446.

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that which Norris himself sanctioned as a proper scale for the payment of Messrs. Cox & Wyman. It seems, therefore, impossible to adopt his scale of payment upon credit prices.

1856.
 April 9th, 10th,
 17th, & 24th.

An insurance company purchased an annuity, and took as a security an assignment of the whole equitable interest of the grantor in a trust fund, which produced much more than enough to pay the annuity; with a proviso, that in case the company should insure any sum not exceeding the price of the annuity and should pay an additional rate of insurance by reason of the grantor going beyond sea, all sums so paid for additional premiums should be retained out of the life interest, and the surplus be held

GREY v. ELLISON.

THIS bill was filed by the six infant children of Sir Charles Edward and Lady Elizabeth, Grey, deceased, in order to obtain payment of the dividends, &c., of certain funds settled on the marriage of their parents.

By a post-nuptial settlement, dated the 18th of May, 1821, in pursuance of an order of the Court of Chancery, Sir. C. E. Grey assigned to trustees (of whom Ellison was the survivor), the share of Lady E. Grey, under the will of her uncle, T. C. Jervoise, on trust to invest the same in stock, on trust to pay the dividends of two shares to Lady E. Grey for her separate use, and one-third to Sir C. E. Grey and his assigns, and on trust for the survivor; remainder among the children of the marriage, &c., &c.

By an indenture dated the 14th of November, 1837, in consideration of 6832*l.* 16*s.* advanced by the trustees of the Globe Insurance Company to Sir C. E. Grey, he, Sir C. E. Grey, covenanted to pay them 800*l.* during his life, and further assigned the dividends on his one-third share in 85,054*l.* 5*s.* 6*d.*, and 5,775*l.* 12*s.* 1*d.*, or other money to arise from such share of Lady E. Grey in the estate of her late uncle, and subject thereto for the benefit of Sir C. E. Grey. Sir C. E. Grey also covenanted that in case the

on trust for the grantee. No policy of assurance was in fact effected, except that the company became their own insurers by making a policy in a separate branch of their own company.—*Held*, that though the grantor did in fact go beyond sea for several years, the company were not entitled to charge the premiums for extra risk which had in fact been incurred, no additional premiums having been in fact paid.

trustees of the company, their executors, &c. &c., should at any time thereafter insure any sums not exceeding 6832*l.* 16*s.* on the life of Sir C. E. Grey, and pay any additional insurance of Sir C. E. Grey going beyond the seas, or taking any military or naval appointment, he, the said Sir C. E. Grey, would pay the trustees all such sum or sums as should be advanced by them or their *cestuis que trusts* for an additional premium or premiums, in respect of his going beyond the seas, or taking a naval or military appointment; and that all sums so advanced by the trustees should be a charge on the premises thereby assigned. By an indenture dated the 25th of October, 1839, indorsed on the above indenture, Sir C. E. Grey granted an additional annuity of 116*l.*, charged on the same property in reservation of 958*l.* paid by the trustees. The indenture also contained a similar covenant as to the payment of premiums.

By an indenture, dated the 13th of November, 1839, in consideration of 2000*l.* paid to Sir C. E. Grey, he, Sir C. E. Grey, assigned to J. A. Smith and N. Malcolm the said one third share on trust to pay first the costs, &c. &c., then the two annuities of 800*l.* and 2116*l.* and any additional premiums, and to retain the surplus for their own use. Sir C. E. Grey, for the consideration aforesaid, assigned his life interest in remainder in the other two-thirds, on certain trusts for the benefit of his children. The dividends in the one third share were applied under the deed until the death of Lady E. Grey, which took place on the 15th of November, 1830, leaving Sir C. E. Grey and several children her surviving.

In June, 1842, Sir C. E. Grey went to the West Indies as Governor of Barbadoes, when 467*l.* 10*s.* was paid on his behalf to the Globe Insurance Company, on the ground that the company had paid, or would have to pay, that sum for additional premium.

The Globe had not effected any insurance with any

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Statement.

Insurance Company on the life of Sir C. E. Grey; but in 1837 the trustees of the Globe Company opened a policy in the life department of their own office, whereby, in consideration of 329*l.* 8*s.* 4*d.*, the sum of 6833*l.* was assured. There was also a second policy opened by the same trustees in the same office for 958*l.* by a policy dated the 28th of November, 1839.

Neither of the policies was stamped, but cheques were drawn for the sums of 329*l.* 8*s.* 4*d.*, and 54*l.* 12*s.* 6*d.*, signed by three of the directors, which were paid by the bankers on account of the annuity department to the credit of the life department, and receipts were given by the cashier in the life department. When Sir C. E. Grey left Europe, the additional premiums, of which only that for the first year was paid by Sir C. E. Grey, amounted annually to 467*l.* 10*s.*

In 1855 Sir C. E. Grey returned to England.

The trustees of the Globe Insurance Company claimed to be allowed all the subsequent annual payments of 467*l.* 10*s.*, which they alleged they had paid for premiums from the 1st of March, 1843, to 1855, when Sir C. E. Grey returned—and claimed to be entitled to charge such payments on that part of the one third which exceeded the sums originally assigned, the trust funds having increased from 85,054*l.* 5*s.* 6*d.*, and 5575*l.* 12*s.* 1*d.*, 110,000*l.* Consols.

Argument.
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Mr. *Bacon* and Mr. *W. W. Mackeson*, for the plaintiffs, contended that as no actual insurance had been effected, the Insurance Company having elected to run the risk, they could not be allowed the additional premiums. They cited *Hutchinson v. Wilson (a)*.

Mr. *Amphlett* appeared for the defendant Ellison.

Mr. Malins and Mr. Baggallay, Mr. Elmsley and Mr. Martineau and Mr. Oliver, appeared for parties in the same interest with the plaintiff.

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Sir *F. Goldsmid* appeared for the Globe Insurance Company.

The VICE-CHANCELLOR:—

Judgment.
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This case raises the question, whether a mode of transacting business which has been very usual with this insurance company, and probably with others, is effectual for the purpose intended.

By the deed which granted an annuity to the Globe Insurance Company, Sir C. Grey assigned to them his equitable life interest—he says, in one-third; but the insurance company says, in whatever more than one-third he might be entitled to—in a very large sum of money. The effect of the deed is, that the Globe Insurance Company have vested in them the whole equitable life interest, subject to their right to deduct their annuity and any other payment which, according to the terms of the deed, can be properly deducted. It is important to observe that of the surplus which may remain after their payments, they are, by the express terms of the deed, trustees for Sir C. Grey, or whoever may claim under him. Therefore, there being an assignment of the whole equitable interest to the insurance company, and they holding it in trust to account for the surplus after satisfying their demand; the question arises, how much and what sort of payments they are entitled to deduct? As to their right to deduct the annuity granted there is no question. But it is said by them that, inasmuch as the annuity would determine on the death of Sir C. Grey, and that by his going abroad, and into climates where his health and life might be endangered, their risk would be greatly increased, they have made provision by

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this instrument for charging against him that which would be sufficient to indemnify them against that risk.

The terms of the covenant are very plain. There is, first, a stipulation that if Sir Charles Grey should go abroad he should give notice to the Globe Insurance Office ; next there is the stipulation in question, which is in these terms: “that in case this company shall at any time hereafter insure any sum, not exceeding the 6800*l.* stated, on the life of Sir C. E. Grey, and shall pay any additional rate of insurance by reason of his going beyond seas, that then all such sum or sums as shall be advanced by them for an additional premium may be retained by them out of the property assigned to them in trust.” They had a right to frame the covenant for their own indemnity in their own way. But on the language used it can hardly be contended that if no insurance at all were effected—if there was not in existence that which they call a policy of insurance—there could be any additional premium. It is remarkable that the only mention of any policy of insurance is in this clause ; there seems to be no mention of any insurance to be effected to protect them against the ordinary risk ; and yet, if there were no insurance to protect them against the ordinary risk, there could clearly be no additional premium ; for an additional premium must be something to be added to a premium previously paid. There is no contract at all for an ordinary policy of insurance upon the ordinary risk. Therefore it is difficult to understand, when the contract is thus expressed, if no premium has been paid at all, and not only no premium, but no additional premium, and no payment of any kind has in fact been made, and no instruments were in existence in respect of which it could be made, how this company can be entitled to deduct anything.

But the insurance company say that virtually there was a policy of insurance effected—that all that is ordinarily done with reference to effecting a policy of insurance was

done. Medical men were referred to ; and an instrument was prepared and executed ; and altogether such a policy of insurance as, if Sir C. Grey had gone abroad, would have required, in order to keep it in force, the payment of an additional premium. But when the instrument is looked at, it is impossible to see upon what view it can be considered as a policy of insurance at all. An objection was taken that the instrument was not stamped. This question must depend on another question, whether it is an instrument requiring a stamp. What is produced is an instrument by which some members of this company agreed with other members of the company that, in a certain event, the company shall pay to the company a certain sum of money. It is only necessary to state the terms of such a contract to show that it is merely an empty formality—an instrument that means nothing. Nobody could sue upon it ; no remedy could be obtained in respect of an instrument of this sort by any one member of this company against any other member.

It has been said, however, and I believe said with perfect truth, that this is an ordinary mode of transacting business, not only with the Globe Insurance Company, but with other insurance companies. But this Court can only look at what is laid before it to see whether it be a contract, and whether it be that which deserves to be dealt with, or which the Court can, upon its principles, deal with as a contract at all. The ground for calling it a contract is this, that this company, with large transactions and large capital, and carrying on an extensive business, has two departments—one the assurance department, and the other a department which deals in annuities and buys annuities. But although there are two departments of one and the same company, the identity of the company is the same. It is said that it is only this—that the company are their own insurers. That is an inaccurate expression, very often used, but it is an expression that means this, that

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there is no insurance at all—that is to say, that the person who might have insured chooses, instead of insuring, to undergo the risk himself. That is exactly what this company did; for if there had actually been an insurance it would mean that, if the event specified in the contract of insurance happens, a gross sum shall be paid. In this case not only could no gross sum ever be paid, but it was never the intention or meaning of the transaction that any sum should be paid in respect of this instrument by any one person to any other.

Therefore, to treat this as a policy of insurance, in the sense of its being a contract to bind these parties, seems to me not to be maintainable on any solid ground of argument. The objection on the ground of the stamp duty, seems to me an idle objection. It cannot be said that a thing that is merely useless and inoperative requires a stamp. If a man were so fanciful as to grant a lease to himself of his own house, with a covenant that he should quietly enjoy, and a covenant that he should pay to himself a rent for his own house, and chooses to conduct it in the way of having two departments, that is, that he will draw cheques upon himself upon his own account for rent, and pay them into another account of his own at his bankers—it would be a mere whimsical transaction; but it would be futile and an abuse of language to say that it came within the law of contract, or within any fiscal regulation respecting stamps.

It seems, therefore, that—so far as this case depends on the right of the company to deduct from that fund of which, after satisfying their own legitimate demand upon it, they are trustees—impossible to say that they are entitled to deduct anything as in respect of any additional premium paid by them; for such right is entirely discountenanced by the language of the deed, which must regulate their conduct as trustees of this fund.

Another view of the case, however, is of some im-

portance. As to the substance of what was intended there seems to be no doubt. What was intended by this covenant was, that the Globe Insurance Company should be protected against the event of Sir Charles Grey going abroad to a climate which should put his life in peril. Now they had a very easy means of enabling themselves to obtain that protection; and the covenant might have been framed so as to entitle them to retain and be paid a certain annual sum in case Sir Charles Grey should go abroad. But there is nothing in the terms of the contract to justify that construction of it. If they chose to incur the risk themselves, without effecting any policy of insurance, they have not stipulated for any right to indemnify themselves by retaining any sum at all. The language of the deed makes it impossible to say, that — not taking that security which they had stipulated to themselves a right to take, not getting any such deed or instrument as they had reserved to themselves a right to—they are yet to be dealt with now as if they had bought it and paid the money for it. That contract Sir Charles Grey never entered into. If they meant him to enter into it, they should have told him so; and it is in vain to say, that the result is exactly the same to him—that he is no more a loser than if the transaction had been conducted exactly in the way that was stipulated for. They have a right to exact the performance of the contract according to the plain construction of its language; so has he; and neither has a right to anything else.

The case before Lord Thurlow (*Hutchinson v. Wilson*) illustrates the principle upon which the Court is bound to deal with this contract. A merchant instructed to effect a policy of insurance, instead of doing so, chose to take on himself the risk, and, having taken the risk, sought, as the Globe Insurance Company seek now, to take to himself the money which he would have paid if he had obeyed his instructions. But inasmuch as he never effected the policy

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of insurance, preferring to take the risk upon himself, Lord Thurlow said in plain terms that he should not be allowed the premium. In this case the insurance company took a security to indemnify themselves for the expense of effecting and obtaining an instrument to secure themselves, which they never obtained. They are, therefore, not entitled to charge this trust fund on the principle that they did make it. The Globe Insurance Company are trustees of the whole of this fund, and in accounting for that surplus of which they are trustees for the plaintiff or others claiming under him, I cannot, as at present advised, think them entitled to deduct anything in respect of payments which they never made in respect of a policy which never was effected.

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VINT v. PADGETT.

Where two mortgages of different estates were assigned to one mortgagee as a security for one gross sum—*Held*, that the purchaser of the equity of redemption of both estates cannot redeem one without redeeming both.

JOHAN CROMACK, junior, by indentures of lease and release, dated the 22d of November, 1818, mortgaged certain mills at Idle, in Yorkshire, to Samuel Broadley, his heirs and assigns (subject to a proviso for redemption), to secure 2200*l.* advanced by Broadley to Cromack, with interest at five per cent.

By a deed, dated the 28th of June, 1822, the same premises were charged with 500*l.* by way of further charge.

Samuel Broadley died on the 10th of July, 1825, having devised all his lands and hereditaments of which he was seised by way of mortgage, &c. &c., to Elizabeth Broadley, William Tetley, William Maud, and James Greenwood, their heirs, executors, administrators and assigns, or the

survivor of them, on trust, on payment of the monies due on the several mortgaged estates, to convey and assign the same to the person entitled to the equity of redemption thereof; he appointed the same persons his executors.

By indenture, dated the 25th and 26th of July, 1825, John Cromack mortgaged certain hereditaments at Idle and Eccleshill to Elizabeth Broadley, her heirs, &c., to secure 1800*l.*, with interest at 4*l.* per cent. By the same instrument, three several terms of 1000 years each were assigned to John N. Blakey, upon further trust, to secure the said sum of 1800*l.* and interest, and then to attend the inheritance. Those terms became vested in the defendant Elizabeth Broadley.

Elizabeth Broadley died in 1826 intestate, leaving Sarah Balme and Mary Balme her next of kin and co-heiresses; and in 1826 these ladies obtained letters of administration of her estate.

Sarah Balme died on the 18th of March, 1828, intestate, leaving Mary Balme her next of kin and heiress-at-law.

William Tetley died in 1830.

By indentures of lease and release, dated the 20th and 21st of November, 1831, between William Maud and James Greenwood, the surviving trustees and executors, and Mary Balme, reciting that the sums of 2200*l.* and 500*l.*, with 287*l.* 0*s.* 4*d.*, were still due to the testator's estate, in consideration of 2987*l.* 0*s.* 4*d.* paid by Mary Balme, all these sums, &c., and the hereditaments comprised in the indentures of November, 1818, were conveyed and assigned unto the said Mary Balme, her heirs and assigns, subject to the proviso for redemption.

Mary Balme died on the 24th of February, 1853, having by her will and codicil, dated July, 1845, and June, 1851, devised to her six executors, their heirs, executors, administrators and assigns, all the estates vested in her by way of mortgage, subject to the equities of redemption which at the time of her death might be subsisting.

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On the 26th of February, 1853, letters of administration of the goods and chattels of Elizabeth Broadley, left unadministered by Sarah Balme, were granted to John Turner Brown.

By an indenture dated the 25th of October, 1853, after reciting that the sum of 2200*L.*, 500*L.*, and 1800*L.*, with interest amounting to 126*L.*, were still due, in consideration of the sum of 5000*L.* paid by George, Ebenezer, and Samuel Vint, to the executors of Mary Balme and John Turner Balme, in the proportions to which they were entitled, the said sums of 2200*L.*, 500*L.*, and 1800*L.*, and the interest then due or to become due thereon, were assigned to the said Messrs. Vint; and by the same indenture all the hereditaments comprised in the indentures of the 1st and 2d of November, 1818, and the 26th of July, 1825, were granted, conveyed, and assigned to the plaintiffs, as tenants in common, subject to such equities of redemption as might be subsisting.

By indentures of lease and release, dated the 20th and 21st of August, 1828, John Cromack assigned the equity of redemption in the premises to J. J. Lee, to secure 500*L.*

John Cromack died on the 26th of July, 1842, having devised and bequeathed all his real and personal estate to the use of his daughter, Jane Padgett, her heirs, &c., &c., &c.

The bill was filed by the plaintiffs, Messrs. Vint, against Jane Padgett and her husband, Elizabeth Blakey, in whom the terms were vested, and J. J. Lee, to foreclose the mortgaged premises.

The question raised, was, whether the defendant Lee was entitled to redeem one of the mortgages without redeeming both.

Mr. *Malins* and Mr. *Pearson*, for the plaintiffs.—The defendant Lee stood in exactly the same position as the original mortgagor; but it was well settled that where the

original mortgagor made a mortgage of the premises to the same mortgagee for a distinct debt, the purchaser of the equity of redemption could not redeem the first mortgage without redeeming the second: *Ireson v. Denn* (a); *Bovey v. Skipwich* (b); *Titley v. Davies* (c); *Smeathman v. Bray* (d); *Watts v. Symes* (e), overruling *Holmes v. Turner* (f).

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Mr. Lee and Mr. W. H. Terrell, for the defendant Lee, cited *Pope v. Onslow* (g); *Bowker v. Bull* (h); *Sinclair v. Jackson* (i); *Bythwood's Conveyancing*, by Jarman, 400, or in 3rd ed., 437.

The VICE-CHANCELLOR :—

There is a difficulty in the case of the defendant Lee, which cannot be got over. He has chosen to take in one entire mortgage for securing one entire sum a conveyance of the equity of redemption of two estates, each subject to a previous mortgage.

It is true that in 1828, when he took as his security these two equities of redemption, he had the right of redeeming either one estate or both. He had the right of proceeding against either separately. Had he chosen to redeem the mortgage upon the estate comprised in the indenture of 1818, he might have filed his bill for that purpose against the mortgagee of that estate without bringing the mortgagees of the other before the Court. But the question is, whether when these mortgages became consolidated, Mr. Lee having the equity of redemption of both estates can be allowed to split his right to redeem,

(a) 2 Cox, 425.

(b) 1 Chan. Cas. 201.

(c) 2 Y. & C. C. C. 399.

(d) 15 Jur. 1051.

(e) 1 De G. M. & G. 240.

(f) 7 Hare, 367.

(g) 2 Vern. 286.

(h) 1 Sim. N. S. 29.

(i) 17 Beav. 405.

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and insist upon redeeming one alone. In my opinion, he cannot, consistently with the terms of his contract.

I am sensible of the difficulty of the question : a difficulty which has been felt by judges of the highest eminence. In *Titley v. Davies*, Lord Hardwicke was obliged to recede from an opinion which he had previously expressed ; and in *Ireson v. Denn*, Lord Kenyon said he did not know why such a rule had been laid down as that which he had been bound to enforce. But in deciding with diffidence upon such a subject, I am strongly impressed with the opinion that he cannot redeem one without redeeming both mortgages.

In accepting by way of security the equity of redemption of two separate estates, Mr. Lee deliberately incurred the risk of their uniting in one hand, and when that union has taken place, there is only one single debt ; and in order to redeem, he must pay off both mortgages, each of which affects the entirety of both estates.

April 7th, 8th
 9th & 10th.

GRESLEY v. MOUSLEY.

Purchase by a solicitor from his client (without the intervention of a disinterested adviser) of certain mineral property which subsequently became of increased value, set aside on a bill filed eighteen years afterwards, although the property had been dealt with by the purchaser.

THIS bill was filed on the 12th of April, 1855, by Sir Thomas Gresley, Bart., against the trustees of the will of the late Sir Roger Gresley, to set aside a purchase of certain land by Mr. Wm. E. Mousley from the late Sir Roger Gresley ; and stated the case as follows :—

Prior to 1837 Mr. Mousley practised as a solicitor at Derby, and had been for many years the solicitor of Sir Roger Gresley, and had received the rents of his estates and raised large sums of money on mortgage, and effected for Sir Roger several sales, and was well acquainted with the estates and with the mines and minerals under the same. At the date of the impeached transaction Sir

Roger was indebted to various persons on debts secured on mortgage to the amount of 85,824*l.*, on bond debts to the amount of 9486*l.* 2*s.* 3*d.*, and on simple contract debts to the amount of nearly 27,000*l.* That his circumstances were well known to Mr. Mousley, who, from March to September, 1837, lent Sir Roger 100*l.* a month and other sums for household expenditure.

In or prior to February, 1837, Mr. Mousley entered into a contract with Sir Roger to purchase the hereditaments in question for 6940*l.*

By indentures of lease and release, dated the 17th and 18th of February, 1837, between Sir Roger Gresley of the first part, and W. E. Mousley of the second part, and one John Mammott of the third part, the manors of Church Gresley and Gresley Castle, in the county of Derby, &c. &c., and several parcels of land in the same county, with all mines and minerals, in consideration of the sum of 6940*l.*, were conveyed to uses for the benefit of W. E. Mousley. The manor extended over 4000 acres of enclosed land and 148 acres of unenclosed lands, including certain cottages with 45 acres of land.

In 1843, W. E. Mousley deposited the title deeds of the purchased property with one Strutt, to secure 5000*l.*, who still held the deeds to secure balance of the loan, and had instituted proceedings to realize his security. Part of the estates had been agreed to be sold, the purchase-money to be payable by instalments, part of which had been paid into the Court in the names of Strutt and the purchasers, to abide the decision in *Strutt v. Mousley*.

In 1849, W. E. Mousley sold part of the minerals comprised in his purchase to Mr. Granville for 6000*l.*, payable by half-yearly instalments of 250*l.* each. The defendants claimed to be entitled to these monies.

W. E. Mousley also sold other parts of the property, and granted a mining lease of another portion.

Sir Roger Gresley, by his will, which was prepared by

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W. E. Mousley, devised his estates to the Earl of Chesterfield and Viscount Castlereagh, on trust to sell to pay his debts, and subject thereto on trust for the wife of H. W. des Vœux, remainder to his issue in tail, remainder to the use of the Rev. Nigel Gresley, remainder to his sons in tail male. He died on the 12th of October, 1837, and was succeeded by Sir Nigel Gresley, who died on the 3rd of September, 1837, who was succeeded by the plaintiff.

W. E. Mousley died on the 4th of January, 1853, having devised his estates to the defendants, the Rev. W. E. Mousley and J. H. Mousley, on certain trusts, and they accepted the trusts of the will.

The bill was filed on the 12th of April, 1855, and prayed for a declaration that the said purchase and conveyances of the 17th and 18th of February, 1837, were and are fraudulent, and that the same ought to stand as a security for such sum of money only (if any) as upon taking the accounts might be found justly due to the estate of W. E. Mousley; for an account of the amounts which on the occasion of the said purchase were paid by W. E. Mousley, with interest, of all sums due to W. E. Mousley for costs, and of the rents and profits, and of the money received from sales and timber; and that on payment of this balance, if any, the defendants, the Rev. W. E. Mousley and J. H. Mousley, might be compelled to reconvey to the uses of the will of Sir Roger Gresley, freed from the equitable mortgage to Strutt, and all other incumbrances. That if a balance should be found due from the estate of W. E. Mousley, then that the defendants, the executors and trustees, might be decreed out of the real and personal estate of W. E. Mousley to pay such balance; and for a receiver and injunction.

The bill further alleged that W. E. Mousley acted as the solicitor, agent, and confidential adviser of Sir Roger, as well as on his own behalf, in and about the treaty for the purchase, and that, as such solicitor and agent, and also on

his own behalf, he prepared the contract for sale, and also the deed of conveyance; and that Sir Roger had not any other solicitor, agent or adviser in the matter.

That the estates so purchased were well known to be rich in coal and other minerals, and the coal-bearing lands were in a ring-fence and eligibly situated for establishing a colliery upon them. That the value of the coal had not since increased, but was now worth not less than 50,000*l.*; and at the time of the sale these facts were and might have been known to W. E. Mousley. Upon the occasion of previous sales of land by Sir Roger Gresley, in the conveyance to purchasers there had been reserved to Sir Roger the mines and minerals under the lands so sold, but no such reservation was contained in the indentures of the 17th and 18th February, 1837.

That the said purchase-money of 6940*l.* was grossly inadequate; and further, that no part, or if any, a very small part only of the said sum of 6940*l.* was in reality paid to Sir R. Gresley; but that by far the larger part was retained by Mr. Mousley for costs; and that under the above circumstances the purchase and conveyance was a fraud upon Sir Roger, and invalid. It was also alleged that at the time of the purchase W. E. Mousley had in his possession evidence and advice that the property was of far greater value than 6940*l.*, but that he did not communicate such evidence to Sir R. Gresley, and in fact Sir R. Gresley had not the benefit of such evidence, and was ignorant thereof.

The bill further alleged that the plaintiff had only recently discovered the circumstances under which the purchase had been effected.

The defendants, the Rev. W. E. Mousley and T. H. Mousley, by their answer said that W. E. Mousley deceased and a partner carried on a very large business as solicitors at Derby, but that they did not act as land or mineral agents. That Sir Roger Gresley managed

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his own estates. That W. E. Mousley never was his agent or the receiver of his rents; but that in the year 1825, W. E. Mousley and his then partner became his country solicitors, and so continued to act (with a change of partner) until 1837. That at the time of the purchase in that year W. E. Mousley was and acted as the solicitor of Sir Roger Gresley, but not otherwise as his agent or confidential adviser. He had from time to time raised large sums of money for Sir Roger on mortgage, but W. E. Mousley had no means whatever of being acquainted with the value of the estates otherwise than from the information of Sir Roger himself. They believed that at the time of the purchase Sir Roger was considerably embarrassed, that is to say, that he owed debts to a greater extent than he had money at command to pay, but that he had real estates of ample value to meet all such debts and leave a large surplus. They said that the purchase-money for the lands in question was the sum of 6940*l.*, which was duly paid by W. E. Mousley to Sir Roger Gresley, and that the manors mentioned in the conveyance of the property were productive only of small chief rents and heriots of trifling value, and not of any other profits. The only part of the purchase of real value was the coal reserved to Sir Roger under lands which had been already sold by him. The manor of Castle Gresley probably extended over 4200 acres, but the lands, except the commons, were not only all enclosed, but were freehold lands held of the manor belonging to other proprietors, from which the lord of the manor derived no profit, nor was he entitled to the coal under the same. In the year 1825 the coal under the lands of Sir Roger Gresley was offered for sale, but no sale was made. In 1827 Sir R. Gresley offered the coal under his estates at and near Gresley, to the agent of the Marquis of Hastings for 6000*l.*, but that this offer was refused, the mineral valuer valuing the coal at a much lower rate. In 1836 Sir Roger sold part of the coal for 2000*l.* to

Court Granville, Esq., who had established pits and machinery on adjoining lands; but all attempts to sell the remainder having failed, W. E. Mousley became the purchaser, and in this manner Sir Roger Gresley received 9000*l.* or thereabouts, for the coal, which he had been attempting to sell for 6000*l.* They said that W. E. Mousley did not act as solicitor for Sir Roger on or about the treaty for the purchase, but the late Mr. Hamilton, of the firm of Few & Co., Henrietta Street, Covent Garden, acted as his solicitor, and that the conveyance was approved by him. They said that the value of the coal had increased since the purchase, not only from the increased consumption and improved method of getting it, but from the circumstance of the construction of a railway from Burton to Leicester, opened in 1849, and which could not have been foreseen in 1837. The defendant, T. H. Mousley, admitted that in 1837 he was an articled clerk in his father's office; that he was present at the time of the execution of the conveyance, and was an attesting witness to the execution thereof, and averred that he then saw what he presumed was the consideration money paid to Sir R. Gresley.

There was an immense mass of evidence adduced to show that Sir Roger Gresley was competent to manage and did in fact manage his own affairs, and also to show the value of the coal at the date of the purchase.

Mr. *Malins* and Mr. *G. F. Russell*, for the plaintiff, contended that, on the authority of all the decisions, the purchase could not be sustained. They cited *King v. Savery* (a), *Holman v. Loynes* (b), *Barnard v. Hunter* (c).

Mr. *Bacon* and Mr. *Osborne* appeared for defendants in the interest of the plaintiffs.

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(a) 1 Sm. & G. 271.

(c) 2 Jur. N. S. 1213.

(b) 4 De G. M. & G. 270.

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Sir *R. Bethell*, Mr. *Amphlett*, and Mr. *C. Hall*, for the defendants Mousley, contended that where as here the plaintiff not having the legal interest stood by, suffering the defendant to incur great expense, this Court would not relieve him: *Senhouse v. Christian* (a). Here it was the railway that had given the increased value, or had made certain what was before a speculative value, and on that the plaintiffs could not rely: *Edwards v. Meyrick* (b).

Secondly, it was contended, the bill having been filed eighteen years after the act complained of had been done, which had been acquiesced in by parties taking interests depending on it, this Court would not now interfere to set it aside, even supposing there had been a defect in it originally.

[*Beckford v. Wade* (c), *Champion v. Rigby* (d), *Lord Selsey v. Rhoades* (e), *Baker v. Read* (f), *Spencer v. Topham* (g), *Parkes v. White* (h), were also cited.]

The VICE-CHANCELLOR (without hearing the reply) said:—

The bill is to set aside a purchase by a solicitor from his client. The law upon this subject is well established; and it is laid down in many cases. The case of *Cane v. Lord Allen* in the House of Lords, was one in which a transaction of this kind was upheld under extraordinary circumstances. Lord Eldon, therefore, took that occasion to explain the law of courts of equity upon this subject. At p. 299 of the 2d vol. of Dow's Reports, Lord Eldon says, "I can find no such doctrine as that an attorney cannot deal with his client. If the attorney were employed to sell, if he dealt for the property, he must

(a) Cited by Lord Eldon in *Norway v. Rowe*, 19 Ves. 159. (e) 2 Sim. & St. 41 (affirmed 1 Bligh, N. S. 1).

(b) 2 Hare, 60, 72.

(f) 18 Beav. 398.

(c) 17 Ves. 97.

(g) 22 Beav. 573.

(d) 1 R. & M. 539; s.c. Tam.

(h) 11 Ves. 209.

put an end to the confidential relation, or put himself completely at arm's length; or, if the contract was afterwards quarrelled (*a*), it would be incumbent on him to show that he had made a reasonable use of that confidence, and had given as ample and correct advice and information to his client as he would have done if his client had been dealing with a third person. He conceived also that if an attorney were employed as agent in the management of a landed estate, he could not deal with his principal for that estate without honestly communicating to the principal all the knowledge respecting its value which he had acquired as his agent; and unless he did this the contract, if questioned, could not be supported."

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The evidence in this case seems almost conclusive against the defendants. Mr. Joseph Nadin proves that he communicated certain information as to the value of the property in question to Mr. Mousley before the sale, and it was the duty of Mr. Mousley to communicate that information to Sir Roger Gresley, his employer. There is satisfactory evidence that Mr. Mousley, the solicitor of Sir Roger, was told that the property which he soon afterwards bought for 13*l.* an acre, was worth at least 100*l.* an acre, and that a competent judge said, if it was his, he would not sell it for 100*l.* an acre. It was the duty of Mr. Mousley to have communicated this information to Sir Roger, and if he wished to be safe, he being a professional man, it was his duty for his own sake to have preserved sufficient evidence that he had communicated it.

The law upon this subject must be held to be known to every professional man, and if a solicitor will deal with his client, and make a purchase, and take the conveyance by a deed, and take the title-deeds relating to the property, the most valuable deed and muniment of title that he can

(*a*) See in original.

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have is evidence reserved and to be found in his repositories, that he dealt fairly with his client, and bought the property under circumstances which could give him a good title to retain it.

The defendants insist that the great length of time puts them in an unfair position as to other means of giving evidence upon this most important point; and they say that if the transaction had been questioned within a reasonable time, evidence might possibly have been produced to show that this information had been communicated. But it is impossible to presume that the information was communicated to the vendor, unless there is something to support that presumption. The mere length of time is no sufficient ground for raising a presumption that this information was communicated. Unfortunately for the defendants, there are other circumstances which go materially to rebut the presumption. And, upon the whole of the case, I have looked in vain for any safe ground upon which this Court would be justified in considering that, under all the circumstances, the burden which the law of the Court throws upon the solicitor to prove the fairness of the transaction can be held to be shifted by length of time; or in imposing upon the plaintiffs, who seek to set aside this transaction, that burden of proof which the doctrine of the Court throws, in the first instance, upon the solicitor who enters into the transaction.

Upon this evidence, if the transaction were recent, it is plain that it could not stand. It is impossible not to see that, if with Mr. Nadin's evidence, a bill had been filed during the lifetime of Sir Roger Gresley, impeaching the transaction, it must have been set aside. Upon the question of value, it must be observed that this property is of a peculiar and extraordinary kind. It is mineral property under the surface of several hundreds of acres, and the nature of it is only to be ascertained and estimated upon the evidence of persons skilled in mineral property,

who from what they know of adjacent collieries, and from what appears upon the surface of the ground in those collieries, speak to the value. I am not much impressed with the importance of the evidence which has been adduced on this question, and for this reason: that independently of it, there are established facts of a conclusive kind. For it appears that the purchase-money paid by Mr. Mousley was 6000*l.*; that was for mineral property under several hundreds of acres. About one tenth part of the property has been sold. Of the minerals, a very small proportion has been sold for a sum of 8000*l.* and upwards, which greatly exceeds the total amount of the purchase-money for the whole; and if the question of value were of importance in this case, it seems to me that the plaintiffs have proved quite enough to show that what Mr. Mousley had got was an advantageous bargain upon a purchase from his own client.

Much weight cannot be attributed to the evidence of the value having been increased since the purchase by railways and other matters.

Upon the question of the length of time, the circumstances relied upon are extraordinary. Sir Roger Gresley, the client, who sold to Mr. Mousley, died not many months after the sale was concluded. He devised his estates to trustees. There is now living a tenant for life, who, through the trustees, is still in the enjoyment of the right to the rents and profits. The acquiescence is alleged as against that tenant for life. She is a married lady, was the widow of Sir Roger, was married about two years after his death, and is married now. The other beneficiary against whom acquiescence is alleged is Sir Nigel, who lived about ten years, and was entitled to a beneficial interest in this property; and then there is the present plaintiff, who, upon the death of Sir Nigel, and from other circumstances, became entitled in remainder to the estate vested in these trustees.

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This part of the case assumes that the transaction was one which might have been set aside if questioned in time. The defence is, that not being questioned in time, it cannot now be set aside. The trustees, it is said, might and ought to have filed a bill many years ago. But what was the situation of these trustees? It appears that after the death of Sir Roger Gresley, Mr. Mousley the solicitor of Sir Roger, was the solicitor of the trustees under this will, in a suit to administer the estate of Sir Roger. Surely that circumstance is a very strong one in accounting for the fact that no suit was instituted by them, and it is to my mind conclusive against any acquiescence. I asked the counsel whether they could give me any case in which it had been held by this Court, upon questions of this kind, that mere length of time was a bar to the right to sue, unless it were length of time accompanied with circumstances which led to the inference of a knowledge of the rights and acquiescence in the transaction. In cases of this kind, where there is a right to question a transaction, there must be brought home to the person against whom acquiescence is alleged, a knowledge of the circumstances which would give a right to question the transaction; and it is hardly surprising, considering the relation in which Mr. Mousley stood towards the trustees under this will, that they neither seem to have had such a knowledge of the transaction as would lead them to question it, nor were they in such a situation as that, if they are treated as the persons entitled to sue, it can be alleged, on behalf of Mr. Mousley, that their not proceeding has amounted to what this Court must consider acquiescence amounting to confirmation.

As to Lady Sophia des Vœux, there is no attempt to show that any time before the filing of this bill she knew or heard of the transaction at all; and without knowledge of the transaction, the length of time and acquiescence can have no place, because a person cannot be said

to acquiesce in a transaction of which he is not proved to have had any knowledge at all. The same remark applies to the present plaintiff. He came of age in 1852. This bill was filed in 1855.

It might have been proved that Mr. Mousley actually paid 6900*l.*, the purchase-money, for which a receipt is indorsed upon the deed which conveyed the property to him. There is not a trace of evidence, except in the receipt for the purchase-money, of the payment of that sum. There would naturally be found in the repositories of Mr. Mousley his bankers' account, or the bankers' account of Sir Roger, to which he must have had access, some means of showing that the purchase-money had been paid. But so far from finding anything in this part of the case to support the defendants, it seems that there is a darkness and suspicion thrown upon the fact of the payment of the purchase-money—a mystery unexplained by the subsequent deeds of mortgage for costs—which conveys not a favourable impression of the caution or accuracy with which Mr. Mousley proceeded in this transaction.

Upon the whole case there must be a decree setting aside this conveyance, and declaring that the sale by Sir Roger Gresley, the testator, in the pleadings mentioned to William Eaton Mousley, ought to be set aside, and decree the same accordingly.

As to the purchase-money, although there is no satisfactory evidence—indeed, no evidence at all except the receipt of Sir Roger—of the payment of the purchase-money, I do not consider that judicially the Court can treat Sir Roger's estate as other than bound by his receipt; and therefore it is that, notwithstanding the want of evidence and the sort of suspicion which, I confess, rests in my mind about the payment of the purchase-money, I think that the trustees and executors of Mr. Mousley have a right to insist, and I hold that they are entitled to insist, that Sir Roger Gresley's estate is bound

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by that receipt. To direct an inquiry as to the payment of the purchase-money would only tend to delay and expense, which could lead to no good result, for the presumption that arises from the signing of the receipt seems to me to be one that is not likely to be removed in any way by any evidence that can be adduced. Therefore it is that I consider the decree must be upon the footing of the right of the trustees and executors of Mr. Mousley to be repaid the purchase-money on the deed of conveyance for which Sir Roger Gresley signed a receipt. The costs of the suit must be taxed and paid by the executors and trustees of W. E. Mousley out of his estate.

The decree was as follows :—

Declare that the sale by Sir R. Gresley to W. E. Mousley deceased ought, but not so as to disturb any such sales or letting as aforesaid, to be set aside, and decree accordingly. Direct the following accounts: First, an account of all monies, rents, and profits, received by W. E. Mousley, his executors, trustees, &c., in respect of the hereditaments comprised in the indentures of the 17th and 18th of February, 1837; and in taking such account, interest to be charged on all sums received other than sums received on account of said rents, &c., at 4*l.* per cent. from the date of such receipt. Secondly, an account of balance due to or from defendants Mousley, as such trustees and executors, in respect of purchase-money 6940*l.* with interest at 4*l.* per cent. from the 18th of February, 1837, after taking into account sums found due on the first account. Order that the defendants Mousley, as devisees of W. E. Mousley, in case the balance should be certified to be in favour of the devisees of Sir R. Gresley, within two months after the date of the said certificate, reconvey the unsold part of the said hereditaments comprised in the said indenture of the 17th and 18th of February, 1837; but order in case the balance be certified to be in favour of the devisees of W. E. Mousley, such reconveyance to be made on

payment of what shall be certified to be due in respect of the purchase-monies of 6940*l.* and interest, and on payment of subsequent interest of so much as shall remain due. Order such reconveyance to be settled at chambers if the parties differ, and, on such reconveyance being executed, that the defendants Mousley do deliver up to the trustees of the will of Sir R. Gresley the conveyance of the 17th and 18th of February, 1837, and all deeds and documents. Order that if the said balance is in favour of the trustees of Sir R. Gresley's will, that the said trustees be at liberty to go in and prove for such balance, with subsequent interest on such balance. Tax the costs of Mr. and Lady Des Vœux, and of the trustees of Sir R. Gresley's will, their costs (one set of costs only to the trustees) to be paid by the plaintiff. Tax plaintiff his costs, including such costs so paid, and such costs to be credited in the account. Liberty to apply.

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1. The existence of any circumstance calculated to bias the mind of an arbitrator, unknown to either of the parties who have submitted to his decision, is a sufficient ground for the interference of the Court. Therefore, where a builder by his contract bound himself to abide by the decision and certificates of an architect as to the amounts to be paid for the work, not knowing that the architect had given an assurance to the employer that the cost of the building should not exceed a certain specified amount, although he refused to guarantee that amount, the Court did not consider the decision of the architect made under such a bias as binding; but gave directions as to ascertain under the authority of

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FORFEITURE.

A clause of forfeiture of income given to the separate use of a married woman, which was to take effect on her becoming entitled to, or in receipt of a permanent income of 1000*l.* a-year—*Held*, not brought into operation by the accruing to her of an income exceeding that amount which by the trust of her marriage settlement made prior to the will, passed to her husband for life, remainder to the wife for life, remainder to the children of the marriage. *Curzon v. Curzon.* 248

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2. The acceptance of bills of exchange transmitting for acceptance accompanied by a bill of lading, is a complex contract, the basis of which is the genuine character of the bills of lading.

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Where, under the pretence that it was a deed of covenant to produce title deeds, a solicitor procured his client to execute a deed of mortgage to himself to secure payment of an alleged debt, the existence of which debt was not proved, the deed thus fraudulently procured to be executed was held to be false and fictitious, and wholly void; and a bill having been filed by an assignee for valuable consideration without notice of the fraud, praying for foreclosure, and a cross bill by the alleged mortgagor, the deed was decreed to be delivered up to be cancelled. *Vorley v. Cooke. Cooke v. Vorley.* 230

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An insurance company purchased an annuity, and took as a security an assignment of the whole equitable life interest of the grantor in a trust fund, which produced much more than enough to pay the annuity ; with a proviso, that in case the company should insure any sum not exceeding the price of the annuity, and should pay an additional rate of insurance by reason of the grantor going beyond sea, all sums so paid for additional premium should be retained out of the life interest, and the surplus be held in trust for the grantor. No policy of assurance was in fact effected, except that the company became their own insurers by making a policy in a separate branch of their own company.—*Held*, that although the grantor did in fact go abroad for several years, the company were not entitled to

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See SOLICITOR AND CLIENT, 3.
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MANOR.

See FINES.

MARRIAGE.

See VOLUNTARY OBLIGATION.

MARRIAGE SETTLEMENT.

Bill by the assignees of a bankrupt to set aside a settlement of the

greater part of the bankrupt's estate, made previously to and in consideration of marriage when the bankrupt was embarrassed and insolvent, and the lady aware of his embarrassments—Dismissed with costs, it appearing that the marriage had been honestly contracted after an engagement for several years. The principle of the decision in *Campion v. Cotton*, 17 Ves. 263, examined and followed.

The reason why the consideration of marriage is so much regarded, is, as supporting a settlement against the claims of creditors. But where a marriage is dishonestly contracted as a mere scheme to defraud creditors, as in *Colombine v. Penhall*, 1 Sm. & G. 228, the settlement will be set aside. *Fraser v. Thompson*. 49

See MARITAL RIGHT.

MARITAL RIGHT.

By a marriage settlement, a fund belonging to the wife was assigned to trustees for her separate use for life, remainder to the children of the marriage with power of appointment, and in default to her next of kin. On her death without issue and intestate, not having exercised the power of appointment, it appearing that she was illegitimate, the husband was held entitled to the fund in his marital right, as all the trusts of the settlement which interrupted the marital right had failed. *Anonymous*. 392

MINES.

See SOLICITOR AND CLIENT.

MINISTER.

See DISSENTING MINISTER.

MISREPRESENTATION.

1. Bill by a shareholder and director in a limited company, alleging that he had been induced by misrepresentation to take shares; but it appearing that though the reports published by the directors contained erroneous but not fraudulent statements, the truth of which the plaintiff had the means of ascertaining, the bill was dismissed; but, the accounts not having been kept as required by the Act, the dismissal was without costs. *Conybeare v. The New Brunswick and Canada Railway Company, Limited.*

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2. Misrepresentation of material facts is a ground for setting aside a partnership contract; and therefore, where a plaintiff entered into a partnership on a representation that the debts of the bank were only £11,000, whereas they were in fact £26,000, the Court declared the partnership void *ab initio*, and directed the payment of the premium, although the plaintiff might *aliunde* have discovered the real condition of the firm. *Rawlins v. Wickham.*

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MONEY.

See SEPARATE USE.

MORTGAGE.

See ACKNOWLEDGMENT.
SOLICITOR AND CLIENT.
FRAUD.

MORTGAGEE.

1. Where a mortgagee under an improper exercise of a power of sale contained in his deed, himself became the purchaser of the mortgaged property, on a bill filed fifteen years afterwards the Court decreed re-

demption, and ordered the costs of the suit to the hearing to be paid by the mortgagee.

No lapse of time will bar the right to redeem where relief is sought against the improper and oppressive exercise of a power of sale by the mortgagee—*Semble. Robertson v. Norris.*

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2. Where a mortgagee by an improper exercise of a power of sale contained in his deed entered into possession as purchaser, and printed the paper, receiving the profits and providing the necessary funds, the Court, having set aside the purchase, refused to allow him to charge credit prices for printing, even though on the mortgage account a balance might be found due to him from the mortgagor.

A motion to obtain the opinion of the Court as to the principle on which the account ought to be taken for the guidance of the chief clerk is not irregular—*Semble. Robertson v. Norris.*

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3. Where two mortgages of different estates were assigned to one mortgagee as a security for one gross sum,—*Held*, that the purchase of the equity of redemption of both estates cannot redeem one without redeeming both. *Vint v. Padgett.*

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See WILFUL DEFAULT.

MORTMAIN.

Bequest of shares in a railway company leased to another company for 1,000 years with power to purchase—*Held*, not within the Mortmain Act. *Linley v. Taylor.* 67

NAME.

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 G. & J. 294.
 CANT'S ESTATE—
 Reversed. July 8, 1859.

CONYBEARE v. THE NEW BRUNSWICK AND CANADA RAILWAY COMPANY—

Their Lordships reversed His Honour's decision on additional evidence, and gave the plaintiff a decree against the *Company* alone, but without costs. (Not reported on appeal.)

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DODD v. THE SALISBURY AND YEovil RAILWAY COMPANY—

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GLYN v. HOOD—

Affirmed, January 18, 1860.

GRESLEY v. MOUSLEY—

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OPENING BIDDINGS.

NEW WILLS ACT.

See WILL, 3.

GIFT OVER.

NEXT OF KIN.

See MARITAL RIGHT.

NOTICE.

Gift by a testator of the rents of his freehold and leasehold estate to his widow and daughters as executrixes for the life of his widow, with a direction after her death to sell the property and to divide the proceeds equally among his children. One of the children mortgaged his reversionary interest to A., who gave no notice, and afterwards to B. who gave notice to one executrix who communicated it to the other.—*Held*, B. was entitled to priority.. *Wiltshire v. Rabbits*, 14 Sim. 76, observed on. *The Consolidated Investment Insurance Company v. Riley*. 371

See EQUITABLE MORTGAGE.

NUISANCE.

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OBLIGATION.

See VOLUNTARY OBLIGATION.

OFFICER.

See PATENT.

OMISSION.

See WILL, 1.

OPENING BIDDINGS.

Before the certificate is signed approving of a purchaser at a sale under the direction of the Court, the biddings will be opened in favour of a bidder who makes a substantial advance in the price; but after the eight days have expired, and the

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certificate is signed, the Court will not disturb the first purchase unless in an extraordinary case. *Re Sir Thomas Jones's Settled Estate*. 284

ORDER.

See REVIVE (ORDER TO).

OUTGOINGS, FREE FROM.

See LEASE.

PARTIES.

See MARITAL RIGHT.

PARTNERSHIP, 1.

PARTNERS.

See PARTNERSHIP.

PARTNERSHIP.

1. Where an executor has improperly employed the assets of his testator in trade, he will be made to account for and pay over those profits, although the persons in partnership with whom he had made those profits are not before the Court as parties to the suit, or in any other character than as witnesses to prove the amount of profits received by the executor. Whether *Simpson v. Chapman*, 4 De G. M. & G., 154, is reconcilable with previous authorities — *Quære*. *Macdonald v. Richardson*; *Richardson v. Martin*. 81

2. Executors and trustees surviving partners of the testator, directed by his will to invest an infant's legacy on Government or real securities, took a security for it in the form of a mortgage on the freehold and leasehold property and fixtures belonging to the partnership in which they were the testator's surviving partners.—*Held*, that they were bound to account for the profits made by so employing the legacy and interest in their trade. And

the will directing the interest to be accumulated from the testator's death, but by the partnership articles, the principal not being payable, but only interest at five per cent. for five years after the testator's death—*Held*, that the amount of interest on the legacy should be computed with annual rests, up to the date of the security, which was dated and taken on the day when the amount of the testator's share was payable.—*Held*, that the entry by the executors in the partnership books of the amount of the legacy to the credit of the legatee, was a sufficient admission of assets. *Townend v. Townend*. 201

See EQUITABLE ASSIGNMENT.
MISREPRESENTATION, 2.

PATENT.

In the case of infringement of a recent patent, it is not a matter of course to require the plaintiff to establish his right at law, but the Court will have regard to the whole case made on the pleading and by the evidence. *Clark v. Fergusson*. 184

PAUPER COSTS.

See SUITORS' FEE FUND.

PERMANENT INCOME.

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PERSONAL ESTATE.

See COVENANT.

PLANT.

See BUILDING CONTRACT, 2.

PLEADING.

See DEMURRER.
PATENT.

PRECATORY TRUST.

POLICY.

The assignee in insolvency held to be entitled to a policy of assurance on the life of the insolvent, effected to secure a sum of money borrowed by the insolvent, but afterwards paid off, the policy having been effected at the expense of the insolvent, and mentioned in his schedule as one of the securities for the debts. *Re the Trust of the Will of the Rev. J. G. Storie, deceased*. 94

See FAMILY ARRANGEMENT.

PORTION.

See COVENANT.

POSTPONEMENT OF REDEMPTION.

See REDEMPTION.

POWER OF SALE.

See MORTGAGEE, 1.

PRECATORY TRUST.

More than fifteen years before his death, a testator purchased two Southampton Pier Bonds for 500*l.* each, having before the purchase told the plaintiff that he had left her by his will more than her sisters, to enable her to subscribe to some charities, and, very soon after the purchase, that he had invested for 1,000*l.* in the pier bonds in her and his own name, but did not mention any trust or purpose. He privately applied the interest in subscribing to certain charities, and, fourteen years after the purchase, mentioned in several letters the charities to which he wished her to apply the interest, but said he did not intend to bind her by any legal document.—*Held*, that no valid trust was created, and no resulting trust, but that the sister was entitled to the fund.

PREMIUM.

A voluntary grant of property *inter vivos* with the expression of a wish as to the way in which the grantee should apply it, but with a declaration that no legal obligation was imposed, does not make the grantee a trustee; and the expression of the wish without imposing an obligation is enough to rebut the resulting trust for want of any consideration moving from the grantee.

Gift of property *inter vivos*, accompanied by expression of a mere wish by the grantor as to the mode of employing the property, and his declaration that no legal obligation as to that mode of employment is intended to be imposed; in such a case no trust results to the grantor for want of valuable consideration. *Wheeler v. Smith.* 300

PRE-EMPTION.

Under a will which directed a sale and conversion of lands into money, a right of pre-emption, grafted on the trust for sale, was held to be lost, by the lands to which the right of pre-emption extended having been purchased by a railway company under their compulsory powers; and the person to whom the right of pre-emption was given, was not entitled to the compensation money, subject to the deduction of the price fixed by the testator. The right of pre-emption being grafted on a trust for sale, which was extinguished by the paramount right of purchase by the railway company—*Held*, that the right of pre-emption fell with the trust on which it was grafted. *Re Cant's Estate.* 12

PREFERENCE.

See FRAUDULENT PREFERENCE.

PREMIUM.

See INSURANCE COMPANY.

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PRIORITY.

See ASSIGNMENT.
NOTICE.

PROBATE.

(Under 21 & 22 Vic. c. 56.)

See PROBATE DUTY.

PROBATE DUTY.

The executor of a testator domiciled in Scotland, having obtained confirmation of the will in Scotland on payment of the duty assessed according to the scale adopted in Scotland, is entitled to have the confirmation sealed in England, so as to have the effect of probate under the Act 21 & 22 Vic. c. 56, without any further payment of duty, although, according to the mode of assessing the duty in England, a higher amount would be payable. *In re the Trustees Relief Acts and the Trusts of the Will of John Booth.* 46

PROFITS.

See PARTNERSHIP.

PURCHASE.

See DEBENTURES.
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PURCHASER.

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QUEEN ANNE'S BOUNTY.

See ADVOWSON.

RAILWAY COMPANY.

See COMPULSORY POWERS, 1, 2, 3.
MISREPRESENTATION, 1.
PRE-EMPTION.

RAILWAY SHARES.

See MORTMAIN.

478 REVIVE (ORDER TO).

RECEIPT.

See FORFEITURE.

RECREATION.

See FAIR.

REDEMPTION.

When a solicitor takes a security from his client, the Court will not give effect to any stipulation if unusual and disadvantageous to the client, such as postponing the right to redeem or pay off the debt for twenty years. *Cowdry v. Day*. 316

See ACKNOWLEDGMENT.

REFUSAL.

See TRUSTEE.

RELEASE.

See COVENANT.

REMAINDERMAN.

See ACKNOWLEDGMENT.

REPLEVIN.

See WILFUL DEFAULT.

REPORTS.

See MISREPRESENTATION, 1.

RESIDUARY DEVISE.

See WILL, 1, 2, 3.

RETAINER.

See SUITORS' FEE FUND.

REVERSIONARY INTEREST.

See ASSIGNMENT.
NOTICE.

REVIVE (ORDER TO).

The executors of a deceased defendant against whom an order was

SEPARATE USE.

made for payment of a sum of money found due by the certificate, having refused to pay the plaintiff before the refusal, obtained the common order to revive, and after the refusal filed a supplemental bill against the executors.—*Held*, that the course pursued was not irregular, and that the form of order in *Edwards v. Batley*, 19 Beav. 457, calling on the executors to admit assets on account, was not intended to supersede in all cases the ordinary course of practice. *Collard v. Roe*. 311

RIGHT TO REDEEM.

See MORTGAGEE, 1.
REDEMPTION.

ROAD.

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See POLICY.

SCOTCH PROBATE DUTY.

See PROBATE DUTY.

SEAL.

See DEBENTURES.

SECURITY FOR COSTS.

See SOLICITOR AND CLIENT, 3.

SEPARATE USE.

Money given without the intervention of trustees to a separate use of a married woman, and received by the husband from the executor, is impressed with the trust for separate use; but where the husband employed the money in business and for his family expenditure with the knowledge and assent of the wife, the Court refused to charge the estate with the amount so received. *Gardner v. Gardner*. 126

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SOLICITOR AND CLIENT.

SERVICE (SUBSTITUTED).

Where a defendant was out of the jurisdiction and had not appeared, but had himself subsequently filed a bill in respect of the same property, the Court gave leave to the plaintiff in this suit to effect substituted service on the solicitor who acted for the defendant as plaintiff in the other suit. *Howkins v. Bennett*. 215

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SETTLEMENT.

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SOLICITOR AND CLIENT.

1. Decree to set aside a mortgage taken by a solicitor from his client, to secure a sum consisting partly of a gross sum agreed to be paid for professional services, and as to the rest of the balance recited to be due on a settlement of accounts, where the evidence showed that the client, from his situation as to ill health, was unable to take an active part in managing his own affairs, and where there was no evidence of any proper statement or examination of the accounts. The mortgage was declared to stand as a security only for what should be found justly due on a taxation of the bills of costs, and on account of all dealings and transactions. *Morgan v. Higgins*. 270

2. A mortgage taken by a solicitor from his client, to secure monies alleged to be advanced, and also certain costs—ordered to stand as security only for what on taking a general account should be found due; it appearing that the defendant, on taking

SUITORS' FEE FUND 479 (SOLICITOR TO).

the security, produced to his client no stated account of the amount due, and had kept no record of the transactions; and the solicitor, having in his answer made misstatements as to some of the items, was ordered to pay the costs of the suit to the hearing. *Davies v. Parry*. 174

3. Purchase by a solicitor from his client without the intervention of an independent adviser, of mineral property, which subsequently became of increased value—set aside on a bill filed eighteen years afterwards, though the property had been dealt with by the purchaser. *Gresley v. Mousley*. 460

SPECIFIC PERFORMANCE.

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See LIMITATIONS.

SUBPÆNA TO PAY COSTS.

The subpœna to pay costs served on the solicitor of a defendant permanently resident out of jurisdiction. *Walrond v. Parker*. 315

SUBSTITUTED SERVICE.

See SERVICE.

SUITORS' FEE FUND (SOLICITOR TO).

Where the Court, at the instance of the plaintiff, orders the solicitor to the suitors' fund to appear for an infant defendant, his appearing

for other defendants, suing *in forma pauperis*, will not disentitle him to the full costs of suit. *Re Colquhoun*, 5 De G. M. & G. 35, decided on the principle of retainer. *Frazer v. Thompson*. 337

SUPPLEMENTAL BILL.

See REVIVE (ORDER TO).

SUPPLEMENTAL ORDER.

Where a sole plaintiff died after decree, the Court made *ex parte* the supplemental order, under the 52d section of 15 & 16 Vic. c. 86. The 52d section is applicable to every case where there has been a transmission of interest by the death of a plaintiff or defendant in a suit. *Jackson v. Ward*. 30

SURETY FOR DEBT.

See POLICY.

TENANT.

See FINES.

INTERPLEADER, 2.

TENANT AT WILL.

See DISSENTING MINISTER.

TENANT IN TAIL.

See ACKNOWLEDGMENT.
GIFT OVER.

TITLE DEEDS.

See EQUITABLE MORTGAGE.

TRANSMISSION OF INTEREST.

See SUPPLEMENTAL ORDER.

TRUST.

See COVENANT.

LIMITATIONS, STATUTE OF.
SEPARATE USE.

WIFE'S EQUITY TO A SETTLEMENT.

TRUST FOR SALE.

See ELECTION.

TRUSTEE.

Where the representative of a deceased trustee made a suit necessary by a wanton refusal to act in the trust, and to receive the dividends of the trust fund—*Held*, she was not entitled to the costs of a bill filed to remove her and appoint other trustees.

Semble, a disclaiming trustee is entitled only to costs as between party and party. *Legg v. Mackrell*. 165

See DISSENTING MINISTER.

UNKNOWN BIAS.

See BUILDING CONTRACT.

VENDOR AND PURCHASER.

See ADVOWSON.

EQUITABLE MORTGAGE.
FINES.

VOLUNTARY OBLIGATION.

An obligation voluntary as to the persons in whose favour it was originally created, ceases to be voluntary in the hands of a transferee for valuable consideration; therefore where M. granted a voluntary bond in favour of his children, which with his privity formed the consideration on the faith of which they married and executed settlements, the Court held that the bonds, though voluntary in their inception, had acquired the character of a debt for valuable consideration. *Payne v. Mortimer*. 118

WIFE'S EQUITY TO A SETTLEMENT.

Where a wife had joined in the assignment of her reversionary interest in a fund to satisfy a debt

due from her husband, and the assignee became entitled in possession, the Court ordered the whole to be settled, it appearing that the husband though living with the wife was unable to contribute to her support, and that the dividends, together with other property of the wife not derived from the husband, was not more than sufficient to maintain her. *In re J. H. Welchman and Anna Margaretta his wife, and the Trustee Relief Acts.* 31

WILFUL DEFAULT.

A mortgagee in possession held not to be chargeable as for wilful default, in declining to defend an action of replevin brought by the owner of property which was on the premises and seized under a distress for rent levied by the mortgagee. *Cocks v. Gray.* 77

WILL.

1. A testator having given to each of his six children a freehold estate, made a second devise to two of the children, and then gave, devised, and bequeathed all the residue of his real and personal estate unto his said four children, naming three only.—*Held*, that all the four children (other than the two) were entitled. *Eddels v. Johnson.* 22

2. The will contained specific be-

quests and devises, and a residuary gift of real and personal estate, but did not charge the real estate with the debts; and the personal estate not specifically bequeathed proving insufficient—*Held*, that the real and personal estate specifically given were to be applied rateably with the residuary real estate in payment of the testator's debts. *Ibid.*

3. Where the will omits to charge the real estate with payments of debts, the real estate, whether devised specifically or in the form of residue, is to be applied in payment of all debts; and the late Wills Act, 7 Wm. 4 & 1 Vic. c. 26, does not affect this charge. *Ibid.*

4. Where a testator gave £4,000 to trustees on trust to pay the income to J. for life, and after his decease to divide the principal equally between the child and children of J. living at his death (except Thomas his eldest son), and the issue then living of any (except the said Thomas then dead); though it appeared that the eldest son was otherwise provided for, and that Thomas was the youngest son—*Held*, the exception void for uncertainty. *Hodgson v. Clarke.* 139

See NOTICE.

PRECATORY TRUST.

PRE-EMPTION.

PRESUMPTION.

FINIS.

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